88-2046

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

KESSEL FOOD MARKETS, INC. AND
KESSEL FOOD STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

At a time when a National Labor Relations Board ("Board") administrative complaint was pending against Petitioner, the Board sued Petitioner in Federal District Court, seeking a preliminary injunction under Section 10(j) of the National Labor Relations Act ("Act") (29 U.S.C. § 160(j)). The Board declared in a verified complaint that Petitioner *had in fact violated* the Act as charged in its administrative complaint.

The Board subsequently reviewed and adjudicated the administrative charges in a purportedly unbiased manner. Consistent with its declaration in Federal District Court, the Board found Petitioner "guilty" and imposed relief which it had sought as Petitioner's District Court adversary.

The question presented is:

Did the Board violate Petitioner's Fifth Amendment due process rights by adjudicating an administrative complaint after concluding and swearing in Federal District Court that Petitioner was in fact guilty of the violations alleged in that administrative complaint?

LIST OF PARTIES

The parties to this proceeding and to the proceeding below are:

Petitioner:

Kessel Food Markets and Kessel Food Stores

Respondents:

National Labor Relations Board

Local 876, United Food and Commercial Workers International Union, AFL-CIO, CLC

Meat Cutters Local 539, United Food and Commercial Workers International Union, AFL-CIO, and CLC

LIST OF CORPORATE AFFILIATIONS

Kessel Food Markets, Inc. and Kessel Food Stores, Inc. were affiliated corporations. Kessel Food Stores, Inc., has been merged into Kessel Food Markets, Inc., during the pendency of this matter. Kessel Food Markets, Inc., has no parent or subsidiary.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

KESSEL FOOD MARKETS, INC. AND
KESSEL FOOD STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Kessel Food Markets, Inc., respectfully prays that a writ issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above proceeding on March 1, 1989.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 868 F.2d 881 (6th Cir. 1989) and is reprinted in the appendix hereto, p. A1 *infra*. The National Labor Relations Board's Opinion and the Administrative Law Judge's recommended decision reviewed by the Board are reported at 287 N.L.R.B. No. 47, 130 Lab. Rel. Rep. 1165 (BNA 1987) and are reprinted in the appendix hereto, p. A21, *infra*.

JURISDICTION

On March 1, 1989, the Sixth Circuit Court of Appeals issued and filed an opinion upholding the Board's decision in this case and enforcing the Board's order. Petitioner's timely application for rehearing *en banc* was denied on April 18, 1989. The Court granted Petitioner's motion to stay issuance of its mandate until June 18, 1989.

The jurisdiction of this Court to review the Sixth Circuit's judgment is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, V Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

29 U.S.C. § 160(j).

> (j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition

any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

STATEMENT OF THE CASE

A. The Board's Suit Under Section 10(j)

On March 16, 1982, the Board's General Counsel filed an administrative complaint with the Board, alleging that Petitioner had violated the National Labor Relations Act ("Act"), and scheduling a September 20, 1982 hearing. Following issuance of the administrative complaint, General Counsel submitted an *ex parte* Memorandum of Facts and Legal Arguments to the Board. The Board members personally considered the matter and were persuaded that Petitioner was guilty of the charges. On July 9, 1982, the Board, through its Regional Director, filed a verified complaint in the United States District Court for the Eastern District of Michigan seeking injunctive relief pursuant to Section 10(j), 29 U.S.C. § 160(j).[1]

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1. Section 10(j) is a provisional remedy designed to secure the status quo pending the Board's resolution of unfair labor practice charges. After a complaint has issued alleging violation of the Act, the Board may seek temporary injunctive relief in federal district court pending final disposition of the unfair labor practice charges before the Board. *See Muniz v. Hoffman*, 422 U.S. 454, 466-467 (1975).

(Appendix p. A137) The Board declared in its sworn district court complaint that it ". . . has reason to believe *and believes* . . ." Petitioner had violated the Act as alleged in the administrative complaint.

The Board withdrew its 10(j) complaint on September 10, 1982, after the District Judge ordered the Board to comply with Petitioner's discovery requests regarding the identity of the Board's witnesses.[2] Ten days later (September 20, 1982) a hearing began on the administrative charges.

B. The Proceedings Below

The Administrative Law Judge issued his decision on October 19, 1984. Petitioner and Respondent Unions filed exceptions and appealed as of right to the Board. The Board issued an opinion and order on December 16, 1987, reaching conclusions it had argued for in district court.

Invoking federal jurisdiction under 29 U.S.C. § 160(f), Petitioner and Respondent Unions appealed the Board's decision to the Sixth Circuit Court of Appeals. The Sixth Circuit enforced the Board's order in an opinion issued and filed on March 1, 1989. Upon motion, the Sixth Circuit panel stayed issuance of its mandate pending Petitioner's application to this Court for a writ of certiorari.

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2. No discovery is available under the Board's administrative procedures, which have been appropriately criticized as "trial by ambush." *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559, 563 (6th Cir. 1977); *Capital Cities Communications, Inc. v. NLRB*, 409 F. Supp. 971, 977 (N.D. Cal. 1976).

REASONS FOR GRANTING WRIT

> *Clearly, if [an agency's] initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.*

Withrow v. Larkin, 421 U.S. 35, 58 (1975).

A. The Board Prejudged Petitioner in Violation of Due Process

It is axiomatic that an accused is entitled to a fair trial by an unbiased decisionmaker:

> Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.

Withrow, 421 U.S. at 47 (citations omitted). The Board denied Petitioner that fundamental right. The Board declared in its district court pleadings that it had decided against Petitioner on the charges in the administrative complaint before Petitioner had any opportunity to contest those charges. By the time Petitioner presented its case at the subsequent administrative hearing, the prosecutor of the administrative charges, through *ex parte* presentation of factual and legal theories, had convinced the Board that Petitioner was guilty. The Board announced that conviction unequivocally in formal papers filed in federal court.[3] Having been prematurely con-

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3. Paragraph 5 of the Board's complaint, filed on its behalf by the Regional Director, provides in relevant part:

(Continued on following page)

vinced that Petitioner was guilty of the unfair labor practices charged, the Board could not fairly and impartially adjudicate these charges in a subsequent administrative proceeding.[4]

B. This Court's Decision in Withrow v. Larkin Requires Reversal of the Decision Below

In *Withrow v. Larkin*, this Court set forth standards to safeguard a respondent's due process right to a fair trial in the context of an agency's prehearing contact with a contested matter. In *Withrow*, a district court enjoined a state examining board's "contested hearing," scheduled to determine whether a physician's medical license should be suspended. The district court reasoned that the examining board could not qualify as an independent arbiter of charges it had earlier investigated.

This Court disagreed, finding no constitutional infirmity in an administrative body's exercise of both investigative and adjudicative functions. *Withrow* also held that the examining board's determination that "probable cause" existed to believe the physician had violated certain criminal provisions did not bar the board from conducting a subsequent adversary hearing because an initial "determination of probable cause" and ultimate adjudica-

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Footnote continued—

> Petitioner has reasonable cause to believe *and believes* that Respondent . . . is engaging in acts and conduct in violation of Section 8 (a)(1), (3), and (5) of the Act. . . .

(Appendix, p. A138)

4. The Board could have limited its preliminary review into the merits of administrative charges for purposes of its 10(j) determination to a "reasonable belief" or "probable cause" standard, reserving final judgment until all the evidence was in. The Board chose not to do so, presumably to persuade the district court of Petitioner's guilt.

tion have different bases and purposes. *Withrow*, 421 U.S. at 58.

This Court cautioned, however, "we should be alert to the possibilities of bias that may lurk in the way particular procedures may work in practice." *Withrow*, 421 U.S. at 54. Moreover, an agency's preliminary review of facts from nonadversary sources must not preclude "fair and effective consideration" at any subsequent adversary hearing. *Withrow*, 421 U.S. at 58.

Here, the Board did not make a probable cause assessment while reserving judgment on the ultimate question.[5] Instead, after reviewing an *ex parte* presentation of facts submitted by the very party prosecuting the administrative charges, the Board concluded that Petitioner had violated the Act and announced that conclusion in Federal District Court. That premature conclusion is irreconcilable with the "fair and effective" review of facts which due process demands.

In the opinion below, the Sixth Circuit approved the Board's 10(j) procedures reasoning that Petitioner had shown "no special facts or circumstances which make the risk of unfairness intolerably high." *Kessel Food Markets*, Appendix p. A15. The court failed to recognize that the Board pronounced Petitioner guilty prior to the administrative hearing. This is not a case raising only the risk or probability of prejudgment. Here, *actual prejudgment* was shown.

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5. In this case, the Board explicitly acknowledged the difference between the "reason to believe" and "believe" standards by citing both as the basis for its complaint. Having chosen to affirm Petitioner's guilt in an effort to secure injunctive relief, the Board cannot now step back from its assertion. The Board should not lightly be presumed to have misled a federal judge. *Withrow*, 431 U.S. at 55; *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676 (9th Cir. 1949).

C. The Need for Supreme Court Review

Congress has chosen to delegate to administrative agencies multiple and often conflicting functions. Agencies commonly exercise primary enforcement authority while serving as the principal arbiter of administrative charges brought pursuant to that enforcement power. The Board's 10(j) authority is an example of such competing functions at work.

This Court has recognized, however, that combining adjudicatory and prosecutorial authority creates the risk that the prosecutor's zeal will overwhelm the judges' neutrality. In *In Re Murchison*, 349 U.S. 133 (1955), this Court observed:

> Having been a part of the [accusatory process] a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all of the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Murchison, 439 U.S. at 136-137.

When it assumes the role of zealous advocate pursuant to Section 10(j), the Board "in the very nature of things" is tempted to make an unequivocal declaration of guilt in an effort to prevail on its 10(j) complaint. The Board has shown here that it cannot resist that temptation. To achieve its aims as prosecutor under Section 10(j), the Board can be expected to continue to abandon its judicial neutrality in favor of prosecutorial zeal.

Guidance from this Court is necessary to check the abuse of due process which such unbridled advocacy entails. This Court should declare that the type of prejudgment which occurred here violates due process.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Filed March 1, 1989)

Nos. 87-6362, 87-6365, 88-5043, 88-5127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KESSEL FOOD MARKETS, INC., and KESSEL FOOD STORES, INC., (87-6362/88-5127),
Petitioners,
Cross-Respondents,

LOCAL 876, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC (87-6365),

MEAT CUTTERS LOCAL 539, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC (88-5043),
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
Cross-Petitioner.

ON PETITION for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Decided and Filed March 1, 1989

Before: MERRITT, MARTIN and JONES, Circuit Judges.

MERRITT, Circuit Judge. These labor cases, consolidated for hearing before an NLRB administrative law judge, before the Board, and on appeal, arise from the staffing of eight ex-Kroger grocery stores in Saginaw, Corunna and Flint, Michigan, puchased by petitioners Kessel Food Markets, Inc. and Kessel Food Stores, Inc. (collectively, "Stores"). The Stores and both Local 876, United Food and Commercial Workers and Meat Cutters Local 539, United Food and Commercial Workers, (collectively, "Unions") petition to vacate portions of the order of the National Labor Relations Board. The Stores also urge that the Board's role under § 10(j) of the Act, 29 U.S.C. § 160(j),[1] in seeking an injunction against them and its subsequent adjudication of charges against them violate their due process right to a hearing before an impartial arbiter. The NLRB cross-petitions for enforcement. Because we believe that the Board's findings are reasonable and supported by substantial evidence and that the § 10(j) process does not violate the Stores' right to due process, we enforce the order of the Board.

Three cases are before us on appeal. In the first, the Union charged and the resulting NLRB complaint alleged that Kessel, in its hiring process for the Saginaw and Corunna stores, unlawfully refused to hire former Kroger employees to avoid successor status and a corresponding duty to recognize and bargain with the Unions. The Board also petitioned the District Court, pursuant to § 10(j) of

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1. (j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order.

the Act, 29 U.S.C. § 160(j), for an injunction, pending final disposition of the charges, enjoining Kessel from engaging in the challenged conduct.

In the second case and before a decision issued in the first, the Unions charged and the resulting complaint alleged that Kessel unlawfully discharged two employees, Huffman and Wallen, who gave adverse testimony at the hearing on the first charge. In the third case and still before a decision issued in the first, the Unions charged and the resulting complaint alleged discriminatory hiring by Kessel at its Flint stores. By motion of the General Counsel, the record in the first case was reopened and the three complaints were consolidated. A hearing before ALJ Kaplan on the consolidated case followed.

At the hearing, the ALJ heard sharply conflicting testimony from approximately 65 witnesses. The ALJ found that Kessel had violated §§ 8(a)(1) and (3)[2] by its hiring practices at Saginaw and Corunna but did not do so at Flint, and that Kessel did not violate § 8(a)(5)[3] by refusing to bargain with the Unions. All parties filed exceptions. The Board substantially affirmed the ALJ but found

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2. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

3. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 159(a) of this title;

additional § 8(a)(1) violations in Kessel's coercive interrogation of applicants and in its non-union statements; and on other grounds, affirmed the dismissal of the § 8(a)(5) allegations at all the stores and the § 8(a)(1) allegations concerning the Flint stores. The Board, therefore, ordered Kessel to cease and desist from engaging in the unfair labor practices, reinstate the two discharged employees, offer employment to all applicants who were victims of discrimination, pay back wages where appropriate and post a remedies notice.

Kessel now appeals the Board's finding (1) that its hiring process at Saginaw and Corunna violated §§ 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3); and (2) challenges, as a violation of its due process right to an impartial arbiter, the Board's power to both pursue an injunction against the Stores and adjudicate the charges against them. The Unions appeal the Board's findings (1) that Kessel's hiring process at the Flint stores did not violate the Act, (2) that ex-Kroger employees who did not apply for positions at the Stores were not entitled to relief, and (3) that Kessel is not automatically deemed a successor to Kroger and required to recognize and bargain with the Unions.

I.

At the hearing the ALJ heard testimony of approximately 65 witnesses with sharply conflicting versions of the events. The ALJ had the opportunity to observe the demeanor of the witnesses and assess their credibility. The ALJ rendered a detailed opinion specifically resolving the conflicts in the testimony and setting forth a reasoned basis for crediting the testimony of some witnesses over that of others. The following facts, as found by the ALJ,

are supported by substantial evidence and form a legitimate basis for the ALJ's conclusions.

A. Hiring at Saginaw and Corunna Stores

During the summer of 1981, Kroger offered for sale a package of 13 stores in eastern Michigan. Kroger formally announced the closing of three of those stores, two in Saginaw (located on Bay Road and State Street) and one in Corunna, in October. In early November, Albert Kessel decided to buy the three Saginaw-Corunna stores.

Kessel offered Sam Morris, a former associate of Kessel, a partnership in the prospective business. Morris declined the partnership but promised to help get the business started. Kessel asked Morris to start by finding prospects for the store manager positions.

On November 13, Morris contacted Richard Huffman, who formerly worked with Morris, and offered him the managership of a store. Morris told Huffman that the stores would be family-owned and nonunion.

Kessel and Morris met again on November 14. Kessel drove Morris around to view the three stores and described his plans in greater detail. Kessel said he planned to open the "Burger King" of grocery stores, with an emphasis on low prices and fast service. Kessel planned to hire a small core of experienced employees for full time work, and a much larger complement of part-time employees, who would work at a lower wage rate. Kessel also informed Morris that he intended to operate the stores without a union.

Kessel went to Cincinnati, Ohio, on November 16 to conclude his purchase. Kessel left Morris local newspaper advertisements about managerial openings for Morris to

place. On November 18, Kessel consummated his purchase and the ads first appeared in the local papers that day.

On November 19, Huffman accepted Morris' offer to manage the store in Corunna. That same day, at the Bay Valley Inn, Morris began taking applications and interviewing applicants for managerial positions. Morris asked one applicant with Kroger experience how she felt about unions and about Kroger, and he told her that his stores would be nonunion. Morris asked another applicant if she would mind working for a nonunion store. On November 23, the interviews moved to a Holiday Inn next to Kessel's State Street store in Saginaw.

On November 25, Kessel placed a new ad for rank and file positions. The new ads identified Kessel and his stores' locations and scheduled interviews for November 27 and 28 at the Bay Road Store in Saginaw.

Morris met with Huffman over breakfast on November 27 to train Huffman in the interviewing process. Morris directed Huffman to hire less than a majority of former Kroger personnel in order to avoid having to bargain with the Unions. The rest of the day, Morris conducted interviews while Huffman sat in and made recommendations on the applicants. Morris asked former Kroger employees how they felt about the Unions and whether they thought Kroger might have survived had the Unions granted concessions.

That evening, Kessel told the group of supervisory staff to be careful about how many former Kroger employees they hired and that the number of former Kroger employees they hired should not approach 50 percent of the total workforce. Kessel said, "No way in hell [do I] want the fucking Union to have penetration into the stores,

because if Kroger could not have survived in that area with Union representation, there's no way Kessel stores could."

Later that night, Kessel told Huffman that hiring so far had been directed to staffing the two Saginaw stores, but that the focus would soon shift to Huffman's Corunna store. Kessel again cautioned Huffman to observe the 50 percent ceiling on hiring employees with Kroger experience and to refuse employment to any member of the Meat Cutters Union.

Initially, Morris conducted the interviews, with Huffman present. Morris asked questions about the applicants' feelings about unions and about Kroger's demise. Huffman routinely informed applicants that the stores would be nonunion and asked former Kroger employees about their feelings toward unions and their opinions on the cause of Kroger's closing. Huffman informed two people who had applied earlier in the process, Gail Zedemont and Ricky Wisner, that he could not hire them because Kessel had a quota for the hiring of former Kroger employees.

On December 7, Kessel told Huffman to lower the percentage of former Kroger employees from 50 percent to 33 percent. In the presence of Brad Wallen, Huffman's meat department manager, Kessel also reminded Huffman that they would not hire any members of the Meat Cutters Union despite Wallen's complaints about the inexperience of the meat department employees hired so far.

In late November or early December, former Kroger employee Bonnie Flathau, who had earlier applied at the Bay Valley Inn, called the store and talked to Mary

Meacham, head cashier at the State Street store in Saginaw. Meacham told Flathau not to be too disappointed if she did not receive an offer because Kessel could "only . . . take a certain percentage of Kroger people, otherwise he'd be in trouble with the Union."

Former Kroger employee Jerry McLaren called to speak with Denise Henke, front end supervisor. Henke, a former Kroger employee, herself, had helped McLaren and some other former Kroger employees go to the front of the line during the Bay Road store's application process. When this group got into the store, Larry Schmidt, manager of the Bay Road store, took down their names on a sheet of paper and told them they did not have to fill out formal applications because they were "as good as hired." Having heard nothing from Schmidt thereafter, McLaren called the store and talked to Henke, who said she was "[s]orry, but we filled our quota of the old Kroger employees."

The two Saginaw stores opened on December 2. The Corunna store opened on December 9. The three stores operated as Kessel Food Markets, Inc. Under Kroger, the three stores had about 174 employees. Under Kessel, the stores had about 239 employees, including 23 supervisors, 16 meat department employees, and 200 employees in the remaining rank-and-file jobs. Seventy-two of the 174 ex-Kroger employees applied for jobs in the Saginaw and Corunna stores. The Company hired 12 as supervisors, none for the meat department, and 22 for the remaining jobs.

The ALJ made these findings of fact. They are supported by substantial evidence and constitute unfair labor practices as the Board found.

B. Hiring at Flint Stores

Kessel purchased five additional ex-Kroger stores located in Flint, Michigan on April 30, 1982, and hired management personnel for those stores during the first week of May. Four of the five persons hired as managers for the Flint stores had previously managed the same stores for Kroger. Roy Brody was hired as director of store operations overseeing all eight stores. At a meeting in Saginaw on May 7, Kessel told his managers that he would prefer to operate the stores without a union, and that it would be the managers' job "to create an atmosphere" in which employees would not feel the need to have a third party represent them.

Ads for rank-and-file employees appeared in the papers on May 11. Kessel segregated the applications of former Kroger employees from those of other applicants. On May 16, Kessel, Brody, and the five store managers met to evaluate these applications. Kessel explained that, contrary to certain rumors and newspaper articles, he had no limit on the number of former Kroger employees who could be hired. The four ex-Kroger managers rated each ex-Kroger applicant as poor, average, good, or excellent, based on their personal knowledge. Kessel insisted on substantiation for any poor or average evaluation. All Kroger applicants who were rated good or excellent, as well as those whom none of the managers remembered, received offers of employment. All other applicants were evaluated based on interviews and a test of their cash register skills.

Kessel hired Patrick Haley, a member of the Meat Cutters Union, in early May as meat manager for all five Flint stores. Kessel asked Haley to do what he could to recruit experienced meat cutters. Haley dis-

covered that few experienced meat cutters were looking for work.

On May 23, the five Flint stores opened for business as Kessel Food Stores, Inc. Under Kroger, the Flint stores had 323 employees. Under Kessel, the stores had 432 employees, including 37 supervisors, 41 meat department employees, and 354 employees in the remaining rank-and-file jobs. Of 124 ex-Kroger employees who sought work in the Flint stores, the Company hired 24 as supervisors, 1 for the meat department, and 59 for non-meat jobs.

C. Retaliation

On September 20, 1982, the ALJ held a hearing on charges that Kessel's hiring practices in Saginaw and Corunna violated the Act. On September 21, Huffman testified, for the most part adversely to Kessel's interests. Wallen was scheduled to testify on behalf of the General Counsel later in the week.

That evening, Kessel called a staff meeting at the Corunna store for all supervisory personnel except Huffman and Wallen and announced that Huffman had testified with "inaccurate recall." Kessel said that he had previously trusted his management personnel, but that now he did not know what to think. He invited those present to tell him anything they might know about Huffman or about Wallen. Kessel told the group that Huffman was no longer to have access to the store office, telephone, or any confidential materials.

Huffman reported to work as usual on September 22. Brody and others met Huffman and explained the restrictions Kessel had just imposed. Brody told Huffman

he was not to discuss the case with anyone and asked for Huffman's keys to the office. Brody also explained that his brother, Al, had been brought in to help manage the store and that Huffman was restricted to dealing with personnel and customers on the sales floor.

Huffman noticed that Al Brody appeared to be following him around that day. When confronted, Al Brody apologized and explained that he was only following orders.

Brad Wallen testified on September 23. After the hearing that day, Huffman and Wallen went to the Corunna store together to check their schedule and to buy some beer. Kessel met them at the check-out counter and informed them that they were suspended with pay and that they should call in daily to check on their status.

Between September 22 and mid-October, various Corunna employees told Kessel about numerous incidents of deception and disloyalty allegedly committed by Huffman and Wallen over the previous six months. In addition, employees Richard Haney and Gary Rubelman reported that Wallen had told them that the Unions had offered both him and Huffman $20,000 for their testimony. Kessel never asked Huffman or Wallen about any of the employees' allegations or made any other investigation. On October 16, Huffman and Wallen received identical letters notifying them that they had been discharged for "repeated acts of disloyalty."

Evidence of these facts sustain the findings and conclusions of the ALJ and the Board respecting Kessel's conduct. The evidence also sustains the conclusion that no unfair labor practices occurred at the Flint stores.

II.

Kessel next challenges, as a violation of due process, the statutory scheme by which the Board may first pursue an injunction against any employer to restrain further activity in violation of the Act and then decide, through the hearing process, whether the employer has violated the Act. Specifically, Kessel argues that such activity impermissibly combines both prosecutorial and adjudicatory functions in a select group of board members and allows the Board to act as prosecutor, judge and jury. In support of its position, Kessel cites the NLRB Case Handling Manual § 10310.1 which requires that the regional director submit a memorandum to the Board which "argues" that the Act has been violated, "argues" in favor of § 10(j) relief and requests permission to pursue such § 10(j) relief. Kessel also cites several cases which stand for the proposition that the person who investigated the underlying facts should not participate in making the resulting adjudicative decision. *See Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962); *King v. Caesar Rodney School District*, 380 F. Supp. 1112 (D. Del. 1974). Finally, Kessel attempts to distinguish the few contrary decisions upholding § 10(j) procedures as erroneous and not well reasoned. *See NLRB v. Sanford Home for Adults*, 669 F.2d 35 (2d Cir. 1981); *Eisenberg v. Holland Rantos Co.*, 234 NLRB 726, *aff'd*, 583 F.2d 100, 104 n.8 (3d Cir. 1978).

This issue is a matter of first impression in this circuit. Two other circuits have reached the issue. In *Holland Rantos, supra*, the Third Circuit stated that upon review of the record, it could find no improper combination of functions of the Board in view of Congress' broad discretion in distributing and combining functions

in its administrative agencies. 583 F.2d at n.8. In *NLRB v. Sanford Home for Adults, supra,* the Second Circuit also declined to invalidate the § 10(j) process.

The Supreme Court reached the general issue of the power of administrative bodies in such instances in *Withrow v. Larkin,* 421 U.S. 35 (1975). In *Withrow,* a physician challenged, as a violation of due process, a state statute which allowed an examining board, composed of fellow doctors, both to suspend temporarily the doctor's license without formal proceedings and also later to suspend his license at its own contested hearing on charges arising from its earlier investigation. The due process claim was based on the doctor's contention that the Board acted as both advocate and judge. In upholding the constitutionality of the state procedure, the Court held that the combination of investigative and adjudicative functions does not, without more, constitute a violation of due process. *Id.* at 46-54. The Court held that the fact that the examining board "proceeded to make and issue formal findings of fact and conclusions of law asserting that there was probable cause to believe" that the physician had violated state law did not show "prejudice and prejudgment." *Id.* at 55-56. The Court reasoned:

> Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial

and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. *It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings.* This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law. . . . We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around. . . .

Here, the Board stayed within the accepted bounds of due process. Having investigated, it issued findings and conclusions asserting the commission of certain acts and ultimately concluding that there was probable cause to believe that appellee had violated the statutes.

The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. *Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is*

> *no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Here, if the Board now proceeded after an adversary hearing to determine that appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing.*
>
> The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation.

Id. at 56-58 (emphasis added) (footnotes omitted) citations omitted).

Withrow is dispositive of Kessel's due process argument. Kessel argues no special facts or circumstances which make the risk of unfairness intolerably high. We, therefore, reject Kessel's argument that the § 10(j) process is unconstitutional.

III.

The Unions argue that the ALJ improperly excluded evidence that ex-Kroger employees did not apply to Kessel because they believed it futile. The Unions argue that in excluding the evidence, the ALJ promised that he would infer futility and, accordingly, Kessel's successor status, from evidence that Kessel engaged in discriminatory hiring practices in violation of § 8(a)(1).

A careful review of the record, however, reveals that the ALJ made no such promise. Such offers of proof were made in two instances—through the testimony of Adams and through that of Dickerson. The proffered Adams testimony was that Adams did not apply for a position with Kessel because certain Kessel employees informed him that the store would be nonunion. *See* Hearing Transcript at 446. The ALJ allowed this testimony with the caveat that Kessel would be given the opportunity to renew his objection to admission and make a motion to strike the testimony in his brief. *Id.* at 453.

The Dickerson testimony was that a Kessel employee told Dickerson that the Stores would hire only a certain percentage of ex-Kroger employees. The ALJ excluded this proffered testimony because the alleged statement was made to Dickerson *after* he had applied for a position with Kessel. *Id.* at 492. The ALJ also stated that such testimony was unnecessary because if he found that Kessel made § 8(a)(1) statements to a number of employees, he *could* (not *would*) infer futility. *Id.* at 490.

It is clear, therefore, that the ALJ did not make the promise the Unions' claim. Moreover, the Unions' argument that the ALJ and the Board are *bound* by *Kallman, d/b/a Love's Barbeque v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), to make such an inference is without merit. In *Kallman*, the Board presumed that nonapplicants were discriminatees because the employer structured its hiring process to prevent the former employees from applying. This presumption is not mandatory and is not appropriate in this case because here there was no concealment of the application process (Kessel's first blind ad was legitimate because it was placed before

Kessel had completed the purchase and was for supervisory, not bargaining unit employees), Kessel's operating plan required a larger number of employees with significantly more of them hired on a part-time basis than did Kroger's and many of the ex-Kroger employees transferred to other Kroger stores and were not looking for work.

Finally, the Unions challenge the Board's finding that Kessel is not automatically deemed a successor to Kroger and required to recognize and bargain with the Unions. Specifically, the Unions argue that once a discriminatory scheme has been demonstrated, the Board was required to find that but for the discrimination, Kessel would have retained all the former Kroger employees and that, therefore, Kessel was a successor to Kroger and must recognize and bargain with the Unions.

A new employer, however, is deemed, for collective bargaining purposes, a successor, only when "there is substantial continuity of the business enterprise." *NLRB v. Burns Int'l Sec. Services, Inc.*, 406 U.S. 272 (1972). To establish continuity of the business enterprise, a charging party must show, *inter alia*, continuity of the work force, i.e., that a majority of the employees of the new enterprise were employees of the predecessor enterprise. *Id.* at 296-97. The Unions, however, are unable to demonstrate such continuity. As the Board correctly concluded, if Kessel had hired all the ex-Kroger employees who applied for positions and who were given information by Huffman, neither Kessel's meat nor non-meat units would have contained a majority of ex-Kroger employees. Moreover, as the Board correctly concluded, ex-Kroger applicants who did not apply were not victims of discrimination, as discussed above. They, there-

fore, could not be considered in making the majority status determination.

In addition, other facts establish that regardless of Kessel's unlawful considerations, Kessel would not have hired Kroger's entire work force. Kessel's store operated with a larger work force composed of more part-time employees than Kroger. Kessel's different operating methods were based on a lawful and legitimate business reason—the desire to have an operation which provided rapid and enhanced customer service. Moreover, many of the former Kroger employees were not available since many transferred to other Kroger stores upon the closing of the Flint, Saginaw and Corunna stores. The Board, therefore, properly refused to impose successor status and the resulting bargaining obligation on Kessel.

For the foregoing reasons, the Board's order is enforced.

(Filed April 18, 1989)

No. 87-6362/88-5127; 87-6365, 88-5043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KESSEL FOOD MARKETS, INC., ET AL.,
Petitioners/Cross-Respondents (87-6362/88-5127),
Petitioners (87 6365, 88-5043),

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner (87-6362/88-5127),
Respondent (87-6365, 88-5043).

ORDER

BEFORE: MERRITT, MARTIN and JONES, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

/s/ Leonard Green
Leonard Green, Clerk

(Filed May 5, 1989)

CASE NOS. 87-6362/88-5127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KESSEL FOOD MARKETS, INC., AND
KESSEL FOOD STORES, INC.,
Petitioners/Cross-Respondents,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ORDER

BEFORE: MERRITT, MARTIN AND JONES, Circuit Judges.

Upon consideration of the motion of the petitioner to stay the mandate,

It is ORDERED That the motion be and it hereby is **granted** and the mandate shall stay until June 18, 1989.

Entered by Order of the Court

/s/ Leonard Green
Leonard Green, Clerk

(Dated December 16, 1987)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Cases 7-CA-20284
7-CA-21213
7-CA-21402

KESSEL FOOD MARKETS, INC., AND KESSEL FOOD STORES, INC.

and

RETAIL STORE EMPLOYEES UNION, LOCALS 876 AND 539, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

DECISION AND ORDER

On 19 October 1984 Administrative Law Judge Irwin Kaplan issued the attached decision. The Respondent, the General Counsel, and the Charging Parties each filed exceptions and supporting briefs.[1] The Respondent and the Charging Parties filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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1. The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the parties' positions.

The Respondent's motions to remand for testimony regarding unemployment compensation fraud and to correct the transcript, opposed by the General Counsel, are denied.

The Board has considered[2] the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions,

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2. The Respondent contends that the Board's consideration of this matter violates the Respondent's due process rights because the Board authorized the General Counsel, under Sec. 10(j) of the Act, to seek an injunction against the Respondent in Federal district court. We find no merit in this contention. The Board's Sec. 10(j) procedures do not deny a respondent due process. *Holland Rantos Co.*, 234 NLRB 726 fn. 3 (1978), enfd. 583 F.2d 100 (3d Cir. 1978).

3. The Respondent and the Charging Parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's credibility resolutions, we do not rely on his statement in sec. III,B,1,(a), par. 11, of his decision, that employee Richard Haney's reference on cross-examination to the Respondent's counsel as "my attorney" manifested an identification with the Respondent. Nor do we rely on the judge's statement in sec. III,B,1,(b), par. 17, that Mary Meacham's rhetorical question to Al Kessel, "Do you want the truth or do you want the lie?" in response to Kessel's inquiry about Greg Ortega, suggested a willingness to be less than forthright.

We also correct the following errors in the judge's decision.

In sec. III,A,1, par. 26, the judge stated it was undisputed that no nonsupervisory members of the Meat Cutters Union were hired in the meat department when the Saginaw and Corunna stores opened. Although the record establishes that no former Kroger meat employees were hired by Kessel at those locations, it does not show that Kessel hired no members of the Meat Cutters Union. Several of the employees Kessel hired into nonsupervisory meat positions had prior meat experience. For example, Gerda Duby had been employed as a meat wrapper by another company until 1 December 1981. The record does not show whether she was a member of the Meat Cutters Union during her prior employment. In addition, employee Richard Haney was hired by Kessel as a supervisor, but was demoted to a nonsupervisory meat position after 1 day because of a lack of experience. Haney's previous employment was with a meat packing company whose employees were represented by the Meat Cutters Union.

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as modified, to modify the remedy,[4] and to adopt the recommended Order as modified and set forth in full below.

I. Background and Summary

Albert Kessel purchased three Kroger grocery stores in November 1981.[5] Two of the stores were located in Saginaw, Michigan, and one in Corunna, Michigan.

Footnote continued—

In sec. III,B,1,(a), par. 16, the judge inadvertently stated that the presidents of Locals 876 and 539 testified that they had no knowledge of any bribe offers. The president of Local 876 did not testify at the hearing.

In fn. 33, the judge inadvertently stated that President Al Kessel instructed Manager Tom Sawyer to offer Bruce Ketcham part-time work, but not his brother Tom Ketcham. The record shows that Sawyer was instructed to offer work to Tom Ketcham, but not to his brother Bruce.

In sec. III,B,4, par. 13, the judge incorrectly reported the citation to *Gerry's I.G.A.*, 238 NLRB 1141, 1144-1145, 1151 (1978), enfd. 602 F.2d 1021 (1st Cir. 1979).

In fn. 41, the judge erroneously reported the citation to *Clinch Valley Clinic Hospital*, 213 NLRB 515 (1974), enfd. 516 F.2d 996 (4th Cir. 1975).

4. In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

5. Before purchasing the three Kroger stores, Kessel had been executive vice president, treasurer, and director for Hamady Brothers Food Markets. During his Hamady employment, Kessel had been involved in purchasing other Kroger stores on Hamady's behalf. In 1980 Kessel recommended that Hamady open a package of 21 newly acquired Kroger stores on a nonunion basis and not hire a majority of former Kroger employees to avoid recognizing the Union. Hamady officials rejected Kessel's recommendations. In early summer 1981 Kroger offered another group of 13 stores, but Hamady was not interested in purchasing these stores. However, Hamady officials expressed some in-

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On 10 or 11 November 1981 Kessel informed Sanford (Sam) Morris, a former Hamady colleague, that he had the opportunity to purchase three grocery stores and offered Morris a partnership. Morris refused the partnership, but offered to help Kessel get the business started. Kessel asked Morris to investigate the availability of store managers. On 12 or 13 November Morris contacted Richard Huffman, a former Hamady comanager, and asked if he would be interested in a position as store manager of one of three nonunion retail food stores. On 19 November Huffman accepted the offer to be manager of the Corunna store.

On 14 November, the day the Kroger stores closed, Kessel told Morris that the stores he was purchasing were Kroger stores. Kessel told Morris he wanted the stores to be a high service, low price operation which would require a larger work force than Kroger had, but with an emphasis on part-time employees. Kessel suggested a ratio of three or four part-time employees to one full-time employee. Kessel told Morris that he planned to operate the stores on a nonunion basis. Kessel finalized the stores' purchase on 18 November.

Interviewing for managerial positions occurred from 19 to 25 November. On 27 November a mass application process for rank-and-file applicants for the Saginaw stores took place. That morning at a breakfast meeting, Morris

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Footnote continued—

terest in a smaller group of eight stores (two in Saginaw, one in Corunna, and five in Flint). Hamady did not purchase the stores, but in early November 1981 Kessel purchased the Saginaw and Corunna stores for himself.

When Kroger closed the three stores, Local 539 (the Meat Cutters Union) represented the meat department employees at the Saginaw and Corunna stores. Kroger's nonmeat employees were represented by Local 40 (later merged into Local 876).

told Huffman, the Corunna store manager, that Kessel did not want to deal with the Union and directed him to hire less than 50 percent Kroger personnel. Huffman testified that Morris questioned former Kroger employee applicants about their feelings concerning the Union. Huffman also testified that later the night of 27 November Kessel told his managerial staff to be careful not to approach hiring 50 percent former Kroger employees. According to Huffman, Kessel stated, "No way in hell did [Kessel] want the fucking Union to have penetration into the stores, because if Kroger could not have survived in that area with Union representation, there's no way Kessel stores could." Huffman also testified that later that night Kessel told him privately to stay under 50 percent of the Kroger work force and under no circumstance should he hire anyone from the Meat Cutters Union.

On 30 November applications for the Corunna store were taken at the Michigan Employment Security Commission (MESC) office in Corunna. Interviewing for the Corunna store began 1 or 2 December. According to Huffman, Morris continued to ask former Kroger employee applicants their opinion of the Union. Huffman testified that he told former Kroger employee applicants during interviews that the store would be nonunion. He stated he told two nonmeat employees that he could not hire them because he was close to fulfilling the quota of former Kroger personnel.[6]

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6. Other supervisors also told applicants about quotas of Kroger employees. Applicant Bonnie Flathau testified that Supervisor Mary Meacham told her not to be disappointed if she was not hired because the Respondent could only hire a certain percentage of former Kroger employees or it would be in trouble with the Union. Applicant James McLaren testified that Supervisor Denise Henke told him that the Respondent had filled its quota of former Kroger employees.

According to Huffman, on 7 December, Kessel told him and Bradley Wallen, the Corunna meat manager, that he would not hire anyone from the Meat Cutters Union, despite Wallen's complaints about the inexperience of the meat personnel hired.

The Saginaw stores opened 2 December and the Corunna store opened 9 December. A complaint issued 16 March 1982 in Case 7-CA-20284 and a second amended consolidated complaint in Case 7-CA-20284 issued 11 August 1982, alleging, inter alia, that Kessel violated Section 8(a)(5), (3), and (1) of the Act by refusing to hire a majority of former Kroger employees to avoid any "successor" obligation to recognize and bargain with the Charging Parties, and violated Section 8(a)(1) by telling former Kroger employee applicants that the Respondent was restricting the number of former Kroger employees hired to avoid recognizing the Union; that it could not hire any more former Kroger employees because it was close to hiring a majority of such employees; and that the Kessel stores would be nonunion. The complaint also alleged that the Respondent violated Section 8(a)(1) by interrogating applicants about their union sympathies.

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by informing former Kroger employee applicants that the stores would operate nonunion or by interrogating applicants about why they believed the Kroger stores closed. The judge found, however, that the Respondent did violate Section 8(a)(1) by telling applicants that they were precluded from employment because a quota or percentage of former Kroger employees had been established to avoid dealing with the Union. The judge also found that the Respondent

violated Section 8(a)(3) and (1) of the Act by discriminatorily limiting its hiring of former Kroger employees at the Saginaw and Corunna stores.[7] The judge dismissed the 8(a)(5) and (1) allegation, finding that Kessel was not a successor to Kroger's bargaining obligation at the three Saginaw and Corunna stores and five Flint area stores subsequently purchased by Kessel (see discussion below).

We agree with the judge, for the reasons stated in section III,B,3,A of his decision, that the Respondent's Saginaw and Corunna hiring practices violated Section 8(a)(3) and (1) of the Act. We also agree with the judge, for the reasons given in section III,B,2(3) of his decision, that the Respondent violated Section 8(a)(1) of the Act by telling applicants at Saginaw and Corunna that they were precluded from employment because of a quota of former Kroger employees. For the reasons stated in section II below, however, we disagree with the judge's conclusion in section III,B,2(1) that the Respondent did not violate Section 8(a)(1) of the Act by telling applicants that the stores would operate nonunion.[8] We agree with the judge that the 8(a)(5) and

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7. The judge did not extend his finding to former Kroger employees employed at Saginaw and Corunna who did not apply for employment with the Respondent. The judge also found that the 8(a)(3) violation did not extend to Greg Ortega, Susan Tahash, and Ricky Wisner, but did extend to other members of the Ortega family.

8. We also disagree with the judge's conclusion in sec. III,B,2(2) of his decision that the Respondent did not violate Sec. 8(a)(1) of the Act by interrogating former Kroger employee applicants concerning their attitudes toward the Union. Store Manager Huffman asked some applicants at their interviews about their union feelings. He also told them that the stores would be nonunion. We find the interrogations of applicants who were not open union adherents, which occurred in the same conversations as the unlawful nonunion statements

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(1) allegations should be dismissed, but, for the reasons stated in section IV below, we do not fully agree with his rationale.

Kessel purchased five additional Kroger stores located in Flint, Michigan, on 30 April 1982. On 12 May 1982 a mass application process took place, and on 16 May Kessel held a meeting with former Kroger supervisors to evaluate the former Kroger employee applicants. On 23 May the five Flint stores opened. On 3 November 1982 the charges in Case 7-CA-21402 were filed, alleging that Kessel had engaged in the same discrimination in hiring former Kroger employees at the Flint stores as at the Saginaw and Corunna stores and unlawfully refused to bargain with the Unions at the Flint stores. The complaint also alleged additional 8(a)(1) violations concerning statements allegedly made at the Flint stores. A complaint issued on 10 December 1982 and was amended 25 February 1983 to allege that the Respondent refused to bargain with the Unions as representatives of employees in the two eight-store units (meat and nonmeat) consisting of the Saginaw, Corunna, and Flint stores.

The judge found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discriminatorily limiting the hiring of former Kroger employees at the Flint stores. Although we agree with the judge

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Footnote continued—

(see discussion in sec. II, below), were coercive regardless of what may have been the Respondent's uncommunicated motivations for seeking this information. See *Christie Electric Corp.*, 284 NLRB No. 87, slip op. at 4 (June 30, 1987) (interrogation violated Sec. 8(a)(1) when it was accompanied by an unlawful threat to do anything to keep union out and to not sign a contract). Because findings concerning other alleged interrogations would be cumulative, we find it unnecessary to pass on them.

that the Respondent did not violate Section 8(a)(3) and (1), we do not subscribe to his rationale, as detailed in sec. III below. As noted previously, we agree with the judge's dismissal of the 8(a)(5) allegations, for the reasons stated in sec. IV below. The judge also dismissed the 8(a)(1) allegations concerning statements allegedly made by Supervisors Richard Knight and Tom Lazar.[9]

The hearing in Case 7-CA-20284 opened on 20 September 1982 and closed 7 October 1982. Huffman, the Corunna store manager, testified against the Respondent 21 September 1982. That evening, Kessel held a meeting of the Corunna supervisors and advised them, inter alia, that Huffman's testimony reflected "inaccurate recall."[10] He told the staff that Huffman would no longer have access to the office and confidential data.

On 23 September 1982 Wallen, the Corunna meat manager and friend of Huffman, also testified against the Respondent. When Huffman and Wallen returned to the store that evening they were told they were suspended with pay. On 16 October they were discharged. A complaint in Case 7-CA-21213 issued on 9 November 1982, alleging that the suspensions and discharges violated Section 8(a)(4) and (1) of the Act.

We agree with the judge, for the reasons stated in sec. III,B,4 of his decision, that the Respondent violated

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9. No exceptions were filed to the judge's findings in sec. III,B,2(4) of his decision entitled "Other Statements," concerning these alleged statements.

10. In sec. III,B,4, par. 5 of his decision, the judge stated that "Kessel summoned the Corunna store's supervisors to a meeting to tell them of their colleague's betrayal." The Respondent contends that the judge's "use of such prejudicial terminology is hardly warranted." We do not adopt the judge's terminology.

Section 8(a)(1) of the Act by suspending and later discharging Huffman and Wallen because they testified against the Respondent at the hearing in Case 7-CA-20284.[11]

II. Nonunion Statements

The judge found that Kessel officials informed former Kroger employee applicants that the stores would operate nonunion.[12] The judge, however, citing *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974), did not find the statements coercive. He reasoned that, absent successor obligations, the Respondent was free to commence operations on a

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11. The judge found it unnecessary to decide whether this misconduct also violated Sec. 8(a)(4).

12. The record discloses the following testimony regarding "nonunion" statements made by the Respondent's agents. Some of these statements were made to former Kroger employee applicants at the Saginaw and Corunna stores and some were made to applicants at the Flint stores subsequently acquired by Kessel. At Saginaw and Corunna, Richard Huffman testified that he told applicants during their interviews that the stores would be nonunion. Applicant Bonnie Flathau testified that Sam Morris asked if she would mind working for a nonunion store. Applicant Thressa Porter testified that Sam Morris told her the Company would be nonunion (Morris' statement was in response to Porter's question, which she asked after he asked her how she felt about the Union). Applicant David Dickerson testified that Sam Morris told him the stores would be nonunion.

At Flint, applicant Jeffrey Poisson testified that Supervisor Tom Sawyer told him that there was a chance the stores would be nonunion, but that it would be up to the employees after the stores opened. Applicant Daniel Lancto testified that Respondent Vice President Tim Kessel asked him if he realized the Company was going to be nonunion. Applicant Bruce Ketcham testified that Al Kessel asked him if he understood the stores would be nonunion. Applicant Tom Ketcham testified that Al Kessel said the stores would open as a nonunion stores. Applicant Janet Colburn testified that Supervisor Roy Brody told her that the stores would not have a union when they opened.

nonunion basis, as it told applicants. The judge was also not persuaded that the Respondent, rather than the applicants, first brought up the subject of the Respondent's nonunion status.

The Charging Parties contend that the judge misinterpreted *Burns* and *Howard Johnson*, and that an employer is not always free to commence operations on a nonunion basis. They further argue, contrary to the judge's finding, that the Respondent, not the applicants, in most instances initiated the discussion about the stores' nonunion status. They also contend that even if the applicants did initiate the discussion, the statements are nevertheless coercive and violate Section 8(a)(1).[13] We agree with the Charging Parties. *Burns* and *Howard Johnson* hold that although a purchasing employer has no obligation to hire the seller's unionized employees, it may not refuse to hire those employees solely because they are union members or to avoid being required to recognize the union. Under *Burns*, the purchasing employer has an obligation to recognize and bargain with the union if a majority of the purchaser's employees were previously employed by the seller and were represented by the union. Thus, the employer does not know whether it will be union or nonunion until it has hired its work force. When an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the seller's employees to ensure its nonunion status. Thus, such statements are coercive and violate Section 8(a)(1). See *Potter's Chalet Drug*, 233 NLRB 15, 20 (1977), enfd. mem. 99

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13. The General Counsel argues that the nonunion statements were coercive because they were made in the context of other 8(a)(1) and (3) violations.

LRRM 3327 (9th Cir. 1978); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 124 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981).[14]

III. Hiring Practices at Flint

As stated above, we find that although the Respondent violated Section 8(a)(3) and (1) by discriminatory hiring at Saginaw and Corunna, the Respondent did not violate Section 8(a)(3) and (1) by its hiring practices at Flint. We do so for the following reasons.

On 12 May 1982 a mass application process took place, during which applicants were interviewed for positions at the Flint stores. On 16 May Kessel met with four Kessel managers previously employed at Kroger. At the meeting, Kessel asked each manager to rate the former Kroger employee applicants as excellent, good, only average, or poor. The former Kroger employee applicants were hired on the basis of these evaluations. Kessel stated at the meeting that there were no quotas of former Kroger employee applicants.[15] We find ade-

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14. We further find that the evidence does not support the judge's finding that the applicants themselves first brought up the subject of the Union. For example, although the evidence shows that applicant Thressa Porter asked Morris whether the Company was union or nonunion, she did so only after he asked her how she felt about Kroger and the Union. Tom Ketcham, Bruce Ketcham, and David Lancto all testified that they did not initiate any discussion about the stores' nonunion status. Richard Huffman testified that he told applicants the stores would be nonunion. In any event, we find the statements coercive whether the applicants themselves brought up the subject of the Union.

15. The Charging Parties contend that under *Spencer Foods*, 268 NLRB 1483 (1984), enfd. in part, denied in part, and remanded 768 F.2d 1463 (D.C. Cir. 1985), the 16 May evaluation session was itself discriminatory against the former Kroger employees. The Charging Parties argue that the Re-

(Continued on following page)

quate business justification for Kessel's hiring decisions resulting from the 16 May evaluation process.[16]

In the nonmeat unit, represented at Kroger by Local 40 (later Local 876), out of approximately 98 former Kroger employee applicants not hired by Kessel as supervisors, Kessel offered employment to 65 (approximately 66 percent) and 59 were hired. In the meat unit, represented at Kroger by Local 539, out of approximately three former Kroger employee applicants not hired as supervisors, two (approximately 67 percent) were offered employment and one was hired.

In addition, although not relied on by the judge, there was evidence that the Respondent actually sought

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Footnote continued—

spondent applied its hiring criteria less rigidly to new employees in order to inhibit the hiring of former Kroger employees. In *Spencer Foods*, however, the employer had a pretextual anti-nepotism rule that disqualified most of the former work force. Here, there were no such criteria that had the effect of disqualifying most of the former Kroger employees. In addition, those former Kroger employee applicants who could not be evaluated, because none of the former Kroger managers knew them, were presumed employable. With regard to cashier positions, only non-Kroger applicants were tested, as the Respondent presumed that those former Kroger employee applicants who were rated good or excellent had the skills to perform the job.

16. The judge found that as a result of the evaluation process, Kessel hired 79 of 120 former Kroger Flint employee applicants and offered employment to approximately 7 or 8 others. The judge, however, failed in his statistical analysis to take into account that 19 of the 79 were hired into supervisory positions. The issue, however, is whether Kessel discriminated against former Kroger employees for nonsupervisory positions. Thus, the judge's finding that Kessel offered employment to 72.5 percent of the former Kroger employees who applied at Flint is not useful in analyzing whether Kessel discriminated in hiring for nonsupervisory positions. Further, as this case involves two separate units (meat and nonmeat), which were represented at Kroger by two separate unions, we believe that alleged discrimination against unit employees and alleged successorship must be analyzed in each unit separately.

out former Kroger meat employees because of a shortage of qualified meat department employees. Patrick Haley, a former Kroger meatcutter and Local 539 member, testified without contradiction that Kessel hired him and asked him to solicit applications from other meat employees. According to Haley, the Respondent hired several of those former Kroger meat employees Haley contacted. Haley testified that a shortage of qualified meat employees existed because when Kroger closed the Flint stores in December 1981, most of the meat employees transferred to other Kroger stores. Haley testified that by 17 May 1982, all former Kroger-Flint meat employees were working in other Kroger stores. Thus most former Kroger-Flint meat department employees were not available for employment with Kessel and did not apply.

Of the 323 unit employees Kroger employed at the Flint stores before closing, only 120 applied to Kessel. Although the Charging Parties and the General Counsel contend that the other former Kroger employees were discouraged from applying because they believed it would be futile, that contention has not been substantiated.[17] The relatively low number of Kroger applications was as likely due to the 5-month hiatus between Kroger's closing and Kessel's opening or the nature of the positions (predominantly part-time), or Kessel's lower wages and benefits.[18]

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17. See discussion of the alleged appearance of futility in sec. IV, infra.

18. An examination of R. Exhs. 37 and 25 (D) and (E) establishes that former Kroger employees were hired by Kessel at significantly lower wage rates than they received at Kroger. For example, Robert Bain's salary while at Kroger was $10.31 per hour, but he was hired by Kessel at a salary of $6.75. Cashier Jean Whalen's salary at Kroger was $10.31 per hour,

(Continued on following page)

During the hiatus, a complaint had issued concerning Kessel's hiring practices at Saginaw and Corunna. The Charging Parties argue that this caused the discriminatory hiring at Flint to be more carefully concealed. We agree with the judge that there was no direct evidence that any statements concerning a quota at Flint were made or that discrimination against Kroger applicants continued.[19] Although Kessel still preferred the stores to be nonunion,[20] this does not establish that he continued to discriminate at Flint. Kessel was aware, as a result of the complaint in Case 7-CA-20284, that his hiring procedures would be closely scrutinized. In view of the 5-month hiatus between the discrimination at Saginaw and Corunna and the hiring at Flint, the intervening complaint, the lack of evidence of any new quota statements, Kessel's credited statement to his Flint managers that he was not concerned with quotas, and the legitimate business justification for the

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Footnote continued—

but she was hired by Kessel at $5.50. Terry Lazar worked for Kroger for $10.37, but was hired by Kessel for $5.50.

In addition, a comparison of R. Exh. 29 and G.C. Exhs. 2 and 3 reveals, inter alia, that Kroger employees received seven personal days off in addition to six holidays, whereas Kessel employees only receive six holidays. Kroger employees also had dental and optical benefits. Kessel also did not yet have a retirement plan, as did Kroger, although it was committed to having one no later than 1 July 1983.

19. The Charging Parties and the General Counsel argue that the Respondent's unlawful discharge of Supervisors Huffman and Wallen prevented any supervisors from testifying against the Respondent at the hearing concerning the Flint allegations. Although we recognize the chilling effects of such discharges, we decline to infer that absent the discharges, direct evidence of discrimination against former Kroger employee applicants at Flint would have been presented.

20. Kessel told Roy Brody, the director of store operations, that he preferred that the stores be nonunion, and at a 7 May meeting Kessel and Brody so informed the newly hired store managers.

Flint hiring decisions resulting from supervisory evaluations, we find the evidence is not sufficient to show that Kessel discriminated against former Kroger employees at Flint. We therefore find that the Respondent's Flint hiring practices did not violate Section 8(a)(3) and (1) of the Act.[21]

IV. 8(a)(5) and (1) Allegations

We agree with the judge that the 8(a)(5) and (1) allegations should be dismissed. We do not, however, fully agree with the judge's rationale. The General Counsel alleged that the Respondent unlawfully refused to recognize Local 876 as representative of its nonmeat employees in an eight-store unit and Local 539 as representative of its meat department employees in an eight-store unit.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act in refusing to recognize the Unions because it was not Kroger's successor for collective-bargaining purposes. He found no successorship because of a lack of continuity in the business enterprise, the hiatus in operations, the union disaffection a majority of former Kroger applicants expressed, and the fact that the Unions do not represent a majority of the Respondent's employees.

The Charging Parties and the General Counsel argue that Kessel is a successor to Kroger's bargaining obligations because, under *Love's Barbeque Restaurant No. 62*, above, 245 NLRB 78, once a discriminatory scheme is

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21. We find the isolated "nonunion" statements made to applicants at Flint (described at fn. 12, par. 2 above) insufficient to establish the existence of a discriminatory scheme at Flint.

demonstrated, all the predecessor's employees are 8(a)(3) discriminatees, and there is a presumption that but for the discrimination, a majority would have survived. The Charging Parties and the General Counsel also except to the judge's conclusion that Kessel's emphasis on part-time employees and its lower pay and benefits significantly diminished the continuity of the enterprise between Kroger and Kessel. They argue that any successor has a right to make such insignificant changes. They further except to the judge's conclusion that the union disaffection which some of the former Kroger employee applicants expressed raises a question about continuing majority support for the Union and militates against a successorship finding.

We find that the Respondent is not a successor to Kroger's bargaining obligation. We find that even if Kessel had hired all the former Kroger employees who applied to Kessel and whom Kessel did not hire into supervisory positions, former Kroger employees would nevertheless not constitute a majority of Kessel's work force in either the meat or nonmeat unit. Of the approximately 57 Kessel meat unit positions in all 8 stores, only approximately 7 former Kroger employees applied. Of the approximately 554 Kessel nonmeat unit positions in all 8 stores, only approximately 161 former Kroger employees applied. Thus, if the Respondent had hired all former Kroger employee applicants, the former Kroger employees would constitute approximately 12 percent of the meat unit and 29 percent of the nonmeat unit.[22]

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22. Even adding the dozen or so employees to whom Huffman gave false information about job openings (see discussion, infra, fn. 26) to these 161 applicants, and assuming that all that total would have been hired but for the Respondent's discrimination, the Union still would not have a majority in the nonmeat unit.

Under the circumstances of this case, we further find that the Kroger nonapplicants should not be considered discriminatees and should not be counted in determining whether a majority of Kessel's work force in the two units consists of former Kroger employees. Nonapplicants have been considered discriminatees in situations when an employer discourages the predecessor's employees from applying by statements indicating that application would be futile because of their unionized status,[23] or when an employer structures its hiring process to prevent the predecessor's employees from applying.[24] Nonapplicants have also been considered discriminatees when an employer declines to hire any of the predecessor's employees for unlawful considerations.[25]

We agree with the judge that the record does not support a finding that a significant number of Kroger employees failed to apply because they believed it would be futile, or were prevented from applying because of Kessel's initial "blind" advertisements discussed below.

Although the Respondent told applicants that the Company would be nonunion and told four applicants about a quota of former Kroger employees, there is no evidence that the Respondent's statements deterred Kroger employees generally from applying to Kessel. See *Houston*

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23. *Sherwood Trucking Co.*, 270 NLRB 445, 447-448 (1984), enf. denied 775 F.2d 744 (6th Cir. 1985); *State Distributing Co.*, 282 NLRB No. 151 (Feb. 5, 1987) (several employees in the predecessor's 11-employee unit were told either that the successor would not hire union members or that it would not hire employees from the predecessor's unit or that it had already hired the only two of the predecessor's unit employees that it was willing to hire).

24. *Love's Barbeque*, above.

25. *Foodway of El Paso*, 201 NLRB 933, 938 (1973), enfd. 496 F.2d 117 (5th Cir. 1974).

Distribution Services, 227 NLRB 960, 967 fn. 15 (1977), enfd. 573 F.2d 260 (5th Cir. 1978), cert. denied 439 U.S. 1047 (1978).[26]

The Respondent did not conceal the applications process to prevent Kroger employees from applying. Although Kessel initially placed a "blind" advertisement for supervisory personnel at Saginaw and Corunna and interviewed those applicants at a motel, we do not believe that Kessel was intentionally concealing the hiring process to prevent Kroger employees from applying. The advertisements were not for bargaining unit employees, but supervisory positions. The judge found, and we agree, that, unlike the employer in *Love's Barbeque,* Kessel had a legitimate business justification for this hiring procedure because, at the time the advertisements were placed, Kessel had not yet finalized the stores' purchase.

We also find that Kessel would not have hired all Kroger's work force but for unlawful considerations. Kessel's rapid service customer operation required a larger

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26. We are willing to assume, however, that a dozen or so ex-Kroger employees may have been deterred from making formal applications—those whom, according to Huffman's testimony, he falsely told on the day that they contacted him, that no cashiers' positions were available at that time. We cannot conclude that this false statement to these employees created a generalized climate of futility, particularly in view of the fact that the Respondent was actually hiring a number of former Kroger employees. However, although we do not know who these employees were or whether their inquiry to Huffman about possible jobs discouraged them from making a more formal application later, we include them potentially within the class of actual applicants covered by par. 2(a) of the Order, so that they can be made whole if they are identified in compliance as persons who would have been hired but for the discriminatory hiring practices. See generally *NLRB v. Iron Workers Local 433,* 600 F.2d 770, 777-779 (9th Cir. 1979), cert. denied 445 U.S. 915 (1980) (permitting individuals within a discriminated-against class to be identified in compliance).

work force composed of more part-time employees than Kroger's.[27] We find that Kessel's increase in employee complement and emphasis on part-time employees were based on lawful business reasons and were not utilized for the purpose of avoiding successorship obligations.

Because of its need for a larger work force than Kroger, the Respondent was required to seek applications from the public. Furthermore, many of the former Kroger employees transferred to other Kroger stores after the stores closed. In Flint, 5 months elapsed before the stores reopened and many former Kroger employees were no longer available for employment.

Because we find that the nonapplicants are not discriminatees, and the number of former Kroger applicants, combined with the dozen or so given false information, is not sufficient to constitute a majority of Kessel's employees in either a meat or nonmeat unit, we conclude that the Respondent is not a successor to Kroger's bargaining obligation with either Union.[28]

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27. The judge found that when all eight Kroger stores closed, there were approximately 497 employees in all. Full-time employees outnumbered part-time employees 3-to-1. By contrast, Kessel employed approximately 611 employees, but favored part-time employees over full-time employees approximately 3-to-1.

28. In view of our finding of a lack of continuity in the work force, which precludes imposing a successor bargaining obligation on the Respondent, we find it unnecessary to pass on whether there was continuity in the business enterprise notwithstanding the differences in operation between Kroger and Kessel. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S.Ct. 2225, 125 LRRM 2441 (1987).

We do not rely on the judge's finding of union disaffection based on interrogation of applicants at their interviews. There is no evidence that a majority of Kessel's employees expressed union disaffection.

In light of our finding of additional violations, we shall issue Amended Conclusions of Law and a new Order and notice to employees.

Amended Conclusions of Law

Substitute the following for Conclusion of Law 4.

"4. By telling job applicants that it would operate its stores nonunion, by telling the applicants they could not be hired because it had a quota of former Kroger employees, and by interrogating them about their attitudes toward the Union, the Respondent has violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Kessel Food Markets, Inc. and Kessel Food Stores, Inc., Saginaw, Corunna, and Flint, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Establishing discriminatory hiring practices to limit the hiring of applicants formerly employed by the Kroger Company in its Saginaw and Corunna stores to avoid dealing for collective-bargaining purposes with Locals 876 and 539, United Food and Commercial Workers International Union, AFL-CIO-CLC.

(b) Interfering with, restraining, or coercing employees in the exercise of their Section 7 rights by suspending and discharging supervisors because they give testimony under the Act.

(c) Telling job applicants that they cannot be hired because of a quota of former Kroger employees.

(d) Telling job applicants that its stores will operate nonunion.

(e) Interrogating job applicants about their attitudes toward the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer all applicants who would have been hired at the Respondent's Saginaw and Corunna stores but for the Respondent's unlawful discrimination, employment in the positions for which they would have been hired or, if those positions no longer exist, to substantially equivalent positions, dismissing, if necessary, any persons hired to fill such positions.

(b) Make those applicants the Respondent would have hired but for its unlawful discrimination whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Offer Richard Huffman and Bradley Wallen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Remove from its files any reference to the unlawful suspensions and discharges and notify the employees and supervisors in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Saginaw, Corunna, and Flint, Michigan stores, copies of the attached notice marked "Appendix.[29] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 16 December 1987

.....

Donald L. Dotson, Chairman

.....

Wilford W. Johansen, Member

.....

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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29. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT establish discriminatory hiring practices to limit the hiring of applicants formerly employed by the Kroger Company in our Saginaw and Corunna stores to avoid dealing for collective-bargaining purposes with Locals 876 and 539, United Food and Commercial Workers International Union, AFL-CIO-CLC.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by suspending and discharging supervisors because they give testimony under the Act.

WE WILL NOT tell job applicants that they cannot be hired because of a quota of former Kroger employees.

WE WILL NOT tell job applicants that our stores will operate nonunion.

WE WILL NOT interrogate job applicants about their attitudes toward the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL offer all applicants who would have been hired at our Saginaw and Corunna stores but for our unlawful discrimination, employment in the positions for which they would have been hired or, if these positions no longer exist, to substantially equivalent positions, dismissing, if necessary, any persons hired to fill such positions.

WE WILL make those applicants we would have hired but for our unlawful discrimination whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL offer Richard Huffman and Bradley Wallen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful suspensions and discharges and WE WILL notify the employees and supervisors in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

KESSEL FOOD MARKETS, INC. AND
KESSEL FOOD STORES, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone 313-226-3244.

(Dated October 19, 1984)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

Case Nos. 7-CA-20284[2]
7-CA-21213
7-CA-21402

KESSEL FOOD MARKETS, INC., and
KESSEL FOOD STORES, INC.[1]

and

RETAIL STORE EMPLOYEES UNION, LOCALS 876[3] and 539, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

George D. Mesritz, Esq., of
Detroit, MI, for the General
Counsel.

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1. For reasons noted *infra*, Kessel Food Markets, Inc., and Kessel Food Stores, Inc., constitute a single employer within the meaning of Section 2(2) of the National Labor Relations Act, as amended, herein the Act.

2. Prior to the opening of the original hearing, Case No. 7-CA-20080 had settled and by Order, was severed from Case No. 7-CA-20284.

3. Local 876 appears in the caption as amended at the hearing. The record disclosed that Charging Union, Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, was merged into Local 876 on July 1, 1982, and as such, Local 876 became the successor union.

Joseph F. Martin, Esq., and
Robert J. Chovanec., Esq.,
(*Warner, Norcross & Judd*),
of Grand Rapids, Mi, for the
Respondent.

Mary Ellen Gurewitz, Esq.,
(*Marston, Sachs, Nunn, Kates,
Kadushin & O'Hare, P.C.*), of
Detroit, MI, for the Charging
Parties.

DECISION

Statement of the Case

IRWIN KAPLAN, Administrative Law Judge: The allegations in Case No. 7-CA-20284 were tried before me in Flint, Michigan, from September 20 to 23, and from October 4 to 7, 1982. Principally, it was alleged, that in mid-November, 1981, Kessel Food Markets, Inc. (herein "Respondent" or "Kessel"), purchased from The Kroger Company (herein "Kroger"), three retail grocery stores (supermarkets), located in Saginaw and Corunna, Michigan, and in connection therewith, Kessel discriminatorily refused to hire a majority of former Kroger employees to avoid any obligation as "successor" to recognize and bargain with the Charging Parties in violation of Section 8(a)(5), (3) and (1) of the Act.

Subsequent to the close of the aforenoted hearing, a new complaint dated November 9, 1982, issued in Case No. 7-CA-21213 alleging that Respondent suspended on September 23, 1982 and then discharged on October 14, 1982, two supervisors who had testified adversely to Respondent in the aforenoted previously litigated case (Case

No. 7-CA-20284). A further complaint issued on December 10, 1982, in Case No. 7-CA-21402 against Respondent alleging that Kessel engaged in substantially the same conduct as alleged in the aforenoted previously litigated case, with respect to five additional Kroger stores purchased by said Respondent located in the Flint, Michigan, area in May, 1982, thereby further violating Section 8(a)(5), (3) and (1) of the Act.

Counsel for the General Counsel by separate motions dated December 13, 1982 and December 22, 1982, respectively, moved to reopen and consolidate Case No. 7-CA-20284 with the other two outstanding complaints (Case No. 7-CA-21402 and 7-CA-21213). The motions were granted by Order dated February 4, 1983, "for the purpose of further hearing on the allegations on the latter two cases and decision in the consolidated cases in their entirety." (G.C. Exh. 1(x)). Additionally, Case No. 7-CA-21402 was amended further to allege principally that Kessel Food Markets, Inc., and Kessel Food Stores, Inc., constitute a single employer within the meaning of the Act and that employees employed at all eight retail supermarkets purchased by Kessel comprise the appropriate units for the respective Charging Unions. (G.C. Exh. 1(cc)).

Still further, it is alleged, that Respondent, by and through certain named supervisors and/or agents, by informing applicants for employment that Respondent was restricting the number of former Kroger employees to be hired in order to avoid having to recognize the Charging Unions; by informing employment applicants that Respondent would operate its facilities on a nonunion basis; by informing prospective employees that they could not be hired because of their picketing activities and/or

other union support; by coercively interrogating prospective employees regarding their union sympathies; and, by engaging in related acts and conduct, Respondent thereby independently violated Section 8(a)(1) of the Act.

On the other hand, Respondent, in its several answers to the various complaints and amended complaints denied all allegations that it committed any unfair labor practices. In particular, Respondent, *inter alia*, denied the "successor" allegation or that its hiring practices were conceived as carried out, for purposes of avoiding any "successor" obligations to recognize and bargain with the Charging Unions. Additionally, with regard to the Section 8(a)(5) allegations, Respondent, denied that the two Saginaw stores and a third store in Corunna comprised an appropriate unit as originally alleged, and Respondent, relying on Section 10(b) of the Act, as an affirmative defense, asserted that the General Counsel is precluded from establishing that all eight retail grocery stores purchased by Kessel comprise an appropriate unit, as subsequently set forth in the amended complaint in Case No. 7-CA-21402, dated February 25, 1983.

With regard to the independent Section 8(a)(1) allegations, Respondent either denied them factually, or where statements were admittedly made regarding the Union, they were assertedly non-coercive.

The reopened hearing was conducted in Burton, Michigan, on May 16-20, and June 1, 1983. In all, some 65 witnesses testified during the course of this protracted hearing. As will be discussed more fully, *infra*, the allegations turn largely on credibility resolutions.

Issues

The principal issues are:

1. Whether the Respondent is a "successor" employer and as such, whether its refusal to recognize and bargain with the Charging Unions is violative of Section 8(a)(5) and (1) of the Act.

2. Whether a company wide unit is appropriate for collective bargaining purposes, as alleged in the amended complaint in Case No. 7-CA-21402, noting, *inter alia,* Respondent's Section 10(b) defense.

3. Whether Respondent discriminatorily refused to hire a majority of Kroger employees to avoid any obligation as "successor" to recognize and bargain with the Charging Unions, in violation of Section 8(a)(5), (3) and (1) of the Act.

4. Whether Respondent suspended on September 23, 1982 and then discharged on October 14, 1982, two statutory supervisors (Richard Huffman and Bradley Wallen), because they had given testimony adverse to Respondent at the hearing in Case No. 7-CA-20284.

5. Whether Respondent, by and through its supervisors and/or agents independently violated Section 8(a)(1) of the Act, by, *inter alia,* interrogating employment applicants about their union sympathies; informing employment applicants that Respondent was restricting the number of former Kroger employees to be hired in order to avoid having to recognize the Charging Unions; informing employment applicants that Respondent would operate its facilities on a non-union basis; informing prospective employees that they will not be hired because of their picketing activities and/or other union support; and, by engaging in related acts and conduct.

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful considerations of the post-trial briefs, I find as follows:

I. Jurisdiction

Kessel Food Markets, Inc., and Kessel Food Stores, Inc. (collectively "Kessel" or "Respondent"), are Michigan corporations, and constitute a single employer relationship within the meaning of 2(2) of the Act.[4] At all times material herein, Respondent has maintained its principal office and place of business at G-4288 West Pierson Road, in the City of Flint and State of Michigan, and is engaged in the business of operating eight retail supermarket stores, all located in the State of Michigan. In connection with the aforenoted business operations, during a 12-month representative time frame, Respondent has derived gross revenue in excess of $500,000. During the same time frame, Respondent has caused to be transported and delivered to its Michigan supermarket stores, food, groceries, and other goods and materials valued in excess of $50,000, of which, food, groceries, goods and materials valued in excess of $50,000 were received from other enterprises, including, *inter alia*, The Kroger Company, located in the State of Michigan, each

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4. The parties stipulated, the record disclosed, and I find that *Albert Kessel* owns all the stock and is the president of both corporations. Further, *Albert Kessel* has formulated and implemented identical labor relations policies, including wages, benefits and job classifications with respect to all employees of both corporations. Both corporations utilize a single payroll. Still further, employees of all eight stores share substantial common supervision and supervisors and employees have transferred from the Saginaw/Corunna stores to the Flint stores. While Respondent does not concede the legal conclusion of a single employer relationship, the record disclosed, and I find, that the two companies comprise a single-integrated business, as alleged.

of which other enterprises had received the said food, groceries, goods and materials delivered to Respondent directly from points located outside the State of Michigan.

It is undisputed, the record disclosed, and I find, that the Respondent is a employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Further, as noted previously, the record disclosed, and I find, that Respondent is also a single employer within the meaning of Section 2(2) of the Act.

II. Labor Organizations Involved

It is alleged, the Respondent does not dispute, the record disclosed, and I find, that Locals 876, and 539, United Food and Commercial Workers International Union, AFL-CIO-CLC (herein separately also Local 876 and 539 and collectively "Charging Parties" or "Charging Unions"), are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background and Sequence of Events

1. Case No. 7-CA-20284

In November, 1981, Albert Kessel purchased three Kroger stores in the State of Michigan: two in Saginaw; and a third in Corunna and formed Kessel Food Markets, Inc. Immediately prior thereto, Kessel was executive vice president, treasurer and director for Hamady Brothers Food Markets, Inc. (herein "Hamady"), a current competitor. All told, Kessel served Hamady in various managerial capacities over a period of eight and one half

years. As Hamady's chief financial officer, Kessel, *inter alia,* had been deeply involved in the purchase of other Kroger stores, including the Saginaw/Corunna stores which he subsequently acquired for himself.

In 1980, Kessel helped to put together a package in which Hamady purchased 21 Kroger stores in western and northern Michigan. Charging Union Local 539 and other locals of the Retail Clerks Employees Union represented those Kroger employees under collective bargaining agreements. Kessel recommended that those stores open non-union and according to Hamady officials, suggested that they hire non-Kroger employees to avoid "successor" obligations. Thus, Alex Dandy, Hamady's president, chief executive and chairman of the board, testified that Kessel complained about high Union contract rates and recommended not hiring Kroger employees so that the stores would open non-union. Further, Norman Griffin, Hamady's personnel manager, in 1980, testified that Kessel expressed to him at that time, that Hamady not hire a majority of Kroger employees in order to avoid recognizing the Union.

Kessel acknowledged that he objected to the wage rates under the Kroger-Union or Hamady-Union contracts as too high, however, he asserted that he merely told Dandy that Hamady did not have to accept those contracts. While Kessel denied that he told Hamady officials not to hire Kroger employees, he admitted that he recommended that the stores open non-union. Dandy considered Hamady a union company and rejected any notion that the stores open on a non-union basis. A majority of Kroger employees were retained and the 21 former Kroger stores continued to be carried under union contract.

In the early summer of 1981, Kroger offered another package of 13 stores, all located in eastern Michigan, including the three store Saginaw/Corunna combination referred to previously. Dandy expressed no interest at that time in acquiring additional Kroger stores because the initial 21 stores did not prove profitable. However, he expressed some interest a few months later when he learned that Kroger was closing the two stores in Saginaw and a third in Corunna and probably five stores in Flint, Michigan. Thus, Dandy had Kessel meet with Kroger representatives to explore the feasibility of this smaller eight store package. Hamady already had a number of stores in the Flint, Michigan area.

According to Kessel, in October, 1981, Dandy rejected his recommendation that Hamady purchase all eight stores stating, "I (Kessel) must be out of my brain, to make a recommendation like that in face of what kind of experience we've had with the 21 stores." On the other hand, according to Dandy, Kessel recommended against acquiring any of these Kroger stores. Soon after, Kroger announced that the three Saginaw/Corunna stores would be closing.

In early November, 1981, Kessel told Kroger Vice President, Arthur Jurgens, of his desire to acquire the three stores for himself and not for Hamady. A meeting between them was arranged for that purpose which was scheduled to be held at the Kroger main office in Cincinnati on Tuesday, November 17. During the first week in November, 1981, Kessel told Dandy that he was going into business for himself and his sons and gave two weeks notice. Kessel also told Dandy that he needed a few days off to meet with some friends to raise capital for his business. It does not appear that any mention was made of Kroger stores at that time.

On or about November 10 or 11, 1981, Kessel phoned Sanford Morris, a long-time colleague at Hamady but who at that time was self-employed in an unrelated business. Kessel informed Morris that he, Kessel, had the opportunity to purchase three grocery stores and invited Morris to join him as a partner. Morris rejected Kessel's offer but promised to help get him started. Within a day or two, Kessel phoned Morris again to have him check out the availability of prospective store managers. Thus, Morris contacted Richard Huffman, a former Hamady co-manager. Morris told Huffman that the store manager's position was for a new family owned grocery chain comprising three stores, all within a 60 mile radius of Flint and that those stores would be non-union. Huffman at that time was employed as a truck driver and expressed interest in becoming a store manager.

On Saturday, November 14, Kessel revealed to Morris for the first time that the stores involved, were Kroger stores. On that occasion, Kessel and Morris visited the Saginaw/Corunna stores, the last day they operated as "Kroger", as all three stores closed. Kessel explained that he was not interested in a Kroger operation but rather, "a high service, low price operation" and likened it to "Burger King," a fast food outfit. He told Morris that he believed that to accomplish this, they had to emlpoy substantially more employees than Kroger, particularly part-timers. In this connection, Kessel mentioned a three or four to one ratio of part-timers to full-timers. He also described the profile of the type of employees he wanted to hire. Thus, Kessel explained, *inter alia*, that he wanted the full-timers to have "experience" and be the "best qualified people." With regard to part-timers, Kessel was less concerned about expe-

rience and more interested in attitude. For example, Kessel wanted part-timers who also enjoyed serving and being in the presence of customers. Kessel told Morris that he also planned on operating the stores without a union.

The following day, Sunday, November 15, Kessel met with Morris again, this time at the latter's home. Kessel told Morris that he was leaving for Cincinnati to negotiate with Kroger officials and that he would call him Wednesday night to bring him up to date. In the meantime, Kessel asked Morris to place a help wanted advertisement in the newspapers to recruit the managerial staff.[5] The "ad" stated that interviews will be conducted Thursday and Friday, November 18 and 19 at the Bay Valley Inn. It did not identify "Kessel" as the employer to avoid potential embarrassment because the deal had not yet been consummated. (Jt. Exh. 1).

On Wednesday, November 18, Kessel executed the purchase agreement for the three stores. (Resp. Exh. 3). That night Kessel phoned Morris with the news and told him to go ahead with interviewing and screening of applicants for the managerial positions adding that he, Kessel, would join in screening and would review his recommendations on Saturday, November 21. Kessel also told Morris that he would send his son, Timothy, to assist him at the Bay Valley Inn.

On or about November 19, Hoffman accepted Morris' offer to be manager of the Corunna store and arrangements were made for them to meet Friday, November 27,

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5. In December, 1981, *Kessel* and *Morris* executed an agreement for *Morris'* consulting services for Kessel Food Markets, Inc., covering the period November 16, 1981 until January 10, 1982. (Resp. Exh. 4).

the day after Thanksgiving, at the Holiday Inn, near the State Street store and for Huffman to commence his new position.

Dandy testified that on or about Monday morning, November 24, Al Kessel picked him up at his home, in Burton, Michigan, and while driving to work informed him that he had purchased the Kroger Stores; the two in Saginaw and the one in Corunna. According to Dandy, Kessel told him that he would not hire Kroger employees and that the stores would operate non-union. While at the trial, Kessel, did not address himself to this particular conversation, he denied that he refused to hire Kroger employees or that he told anyone that he would limit the number of Kroger employees in his new undertaking.[6]

By mailgram to Kessel dated November 24, 1981, Richard Phillips, the president of Charging Union Meatcutters Local 539 demanded recognition "as the exclusive bargaining representative of the meat department employees at the Saginaw and Corunna Michigan Stores." (Upper case in the Original, G.C. Exh. 5).

For the most part, interviewing for managerial positions continued from November 19 to November 25, the day before Thanksgiving. From November 25 to November 27, Respondent attempted to attract rank-and-file applicants for employment at its two Saginaw area stores (State Street and Bay Road). These interviews were

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6. *Kessel's* testimony *vis-a-vis* Dandy, related to a number of other conversations which occurred earlier in the month without any reference as to whether he would operate on a non-union basis. In assessing credibility, it is noted, *inter alia*, that *Hamady* has instituted lawsuits against *Kessel* in connection with the purchase of the *Kroger Stores* in question. For this, as well as other reasons discussed more fully, *infra*, it is noted that *Hamady* officials were not merely disinterested witnesses.

scheduled for Friday and Saturday, November 27 and 28 at Respondent's Bay Road Store. For the first time, the newspaper advertisements identified Respondent by name and location as a "former Kroger Store." (Jt. Exh. 1).

The application process at the Bay Road store was scheduled to commence at 3:00 p.m. As of 1:30 p.m. to 2:00 p.m., there were already approximately one thousand people on line to apply. At around that time Denise Henke, a Kessel assistant head cashier and former Kroger employee, came out of the store, recognized other Kroger employees who were standing at various points in line, and got a group of eight of them to go around the back of the store, where she allowed them inside.[7] According to these "ex-Kroger" applicants, once inside, they were told all they had to do was write their names, addresses, phone numbers, the jobs they were applying for, and experience on a yellow pad and they were assured by Larry Schmidt, the manager of the Bay Road store, that they were "as good as hired." Of this group however, only Linda Graves was hired.[8] (Jt. Exh. 2 and 3). Al Kessel arrived at the Bay Road store at around 2:30 p.m. and because of the extraordinary number of applicants, he directed most of them to write their names, last jobs and phone numbers on "sign up" sheets. (Resp. Exh. 9). Generally, only those applicants whose appearance impressed Kessel were provided with formal applications.

On Friday, November 27, the day of the mass application process at the Bay Road store described hereinabove,

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7. This group consisted of *Pat Kubik*, *Sally Yolanda Ortega*, *Greg* and *Jim Ortega*, (all family members), *Jerry McLaren*, *Doug Ochodnicky*, *Susan Tahash*, and *Linda Graves*.

8. *Schmidt* did not testify. According to the General Counsel, Respondent reneged on its promise to hire the other members of the group because of its overall decision to avoid "successor" obligations.

still other interviews were being conducted by Morris in the presence of Huffman at the Holiday Inn, near the State Street Store. Earlier that day Morris and Huffman had breakfast and discussed, *inter alia*, Huffman's role in the hiring process. According to Huffman, Morris cautioned him that Kessel did not want to deal with the Union and as such, directed him (Huffman) to stay under a fifty percent ratio with regard to hiring Kroger personnel.[9] All told, Morris conducted some twenty to twenty-five interviews that day in the presence of Huffman. Huffman testified that Morris questioned only Kroger connected applicants (some were still employed by Kroger in the Flint area) about their union feelings and in particular, whether they believed that Kroger would still be operating the stores if the Union had granted wage concessions. According to Huffman, a majority of Kroger or ex-Kroger employees were angry with the Union for not allowing them to make the concessions, and most of them indicated that they would be pleased to work in a non-union store.

On the other hand, Morris for his part, denied discussing union considerations with Huffman and also denied asking applicants about their union sentiments. Morris testified that the subject of hiring, relative to "numbers" of employees from Kroger or from other "sources" was not discussed with Huffman. According to Morris, both he and Huffman had a "preference towards Kroger people . . . because we both [once] worked for Kroger." With regard to Huffman's testimony relative to union concessions, Morris acknowledged only that he

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9. The testimony of *Huffman*, a relatively high ranking company official is critical to the General Counsel's case. A substantial portion of his testimony was disputed by other company officials. As noted previously, the principal allegations turn largely on credibility.

asked ex-Kroger employees why they believed that the stores closed. To this, Morris asserted that he received various responses; some blamed the Union, other blamed management, and still others blamed both.

During the evening of November 27, Al Kessel had provided a buffet dinner at the Holiday Inn for his newly hired managerial staff. Huffman testified, that after dinner, Tim Kessel gave him approximately one hundred applications to call prospective cashiers and set up interviews for the following day. According to Huffman, throughout that day, applications were compiled in stacks by job classification and delineated further as to Kroger or non-Kroger personnel. As for the one hundred applications given to Huffman by Tim Kessel, Huffman testified that he pulled all Kroger applications and marked an "X" in the upper right-hand corner of each application and stacked them separately from non-Kroger applications.[10] (See e.g. G.C. Exh. 11(B-1)). He asserted that Al Kessel had advised him that the "initial core" of full-time personnel had already been hired and to concentrate on the non-Kroger applicants for the remaining positions, the majority of which were for cashiers and courtesy clerks. Thus, Huffman testified that he did not contact any ex-Kroger cashiers.

The theme attributed to Al Kessel by Huffman, to limit the percentage of Kroger employees was repeated

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10. *Huffman* testified that at the time he pulled the Kroger applications, he was not concerned with the identity of the individual, but rather, whether the applicant "had worked for Kroger." To derive this information, *Huffman* asserted, he merely turned to the second page of the application. Thus, *Huffman* could not with absolute certainty identify a given 'X' mark made by him and match it with a given application. According to *Tim Kessel* and *Morris*, they too made 'X' marks on some applications for different reasons. This subject will also be treated more fully, *infra*.

on two other occasions that evening at the Holiday Inn. According to Huffman, (denied by Kessel), just before the eleven o'clock news, Al Kessel addressed members of his managerial staff and cautioned them to be careful not to approach hiring fifty percent of Kroger's work force.[11] As testified by Huffman, Kessel stated, "No way in hell did he want the fucking Union to have penetration into the stores, because if Kroger could not have survived in that area with Union representation, there's no way Kessel stores could."

Huffman also testified that after the news broadcast, Tim Kessel summoned him to meet with his father, privately, in the senior Kessel's car in the parking lot, at the Holiday Inn. According to Huffman, after some general conversation or "small talk", Al Kessel cautioned him, that when he, Huffman, got ready to staff his Corunna store, to stay under fifty percent of the Kroger work force. Huffman was hired to manage the Corunna store but up until then, the majority of applicants were considered for the two Saginaw stores. Huffman testified that Kessel made specific reference to the Meat Cutters Union and called the head of that Union, a man named "Phillips" (Richard Phillips is the president of Meat Cutters Local 539), a "son-of-a-bitch." Kessel assertedly told Huffman that "under no circumstances" should he hire anyone from the Meat Cutters Union.[12]

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11. *Huffman* identified the personnel present in the room at the time *Al Kessel* made these remarks as himself, *Terry Smith*, manager of the State Street store, *Larry Schmidt*, manager of the Bay Road store, *Sam Morris*, and *Al Kessel's* sons, *Tim*, *Tom* and *Jim Kessel*.

12. *Al Kessel* and his son *Tim* acknowledged that *Huffman* met privately with the senior *Kessel* in the latter's car but they provided an entirely different account. Moreover, they asserted that the disputed meeting occurred the following day, Saturday, November 28. This conflict will be addressed more fully, *infra*, in dealing with overall credibility resolutions.

The interviewing process continued at the Holiday Inn on the following day, Saturday, November 28. Morris still had to fill some of the remaining positions at the two Saginaw stores. According to Huffman, Morris conducted the interviews much the same way as he had on the previous day. Thus, Huffman testified that Morris opened the interviews of ex-Kroger employee applicants by asking them about their union sentiments and raising the subject of union concessions (denied by Morris).[13]

Respondent had hoped initially to open all three stores simultaneously. However, early on, Kessel ascertained that he could not effectively accomplish this and decided to open the Corunna store one week after the scheduled opening of the two Saginaw stores. Thus, Respondent's recruitment efforts were directed mainly to staffing its Saginaw stores before undertaking corresponding responsibilities for its Corunna store.

On Saturday, November 28, Respondent, for the first time recruited applicants for its Corunna store, when it caused to be placed a classified advertisement in the local area newspaper. The ad, *inter alia*, scheduled interviews to be held at the Corunna store for Sunday and Monday, November 29 and 30. (Jt. Exh. 1). However, because of the disruptions caused to other nearby stores by the enormous turnout of applicants at the Bay Road facility, the previous Friday, Kessel made "last minute" changes and postponed the hiring process for the Corunna store for

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13. *Huffman* testified that on that same day, he was also present during approximately six interviews conducted by *Tim Kessel*. None of the allegations appear to relate to *Tim Kessel's* conduct at these interviews. *Morris* noted that *Tim Kessel* interviewed applicants for cashier positions at the Holiday Inn that day. For reasons discussed *infra*, I find that *Morris'* testimony tends to support *Huffman's* overall credibility regarding the events on November 27 and 28.

one day. In connection therewith, Kessel made arrangements for applications to be obtained at the Michigan Employment Security Commission (MESC) office in Corunna, rather than at the Corunna store as originally advertised.

The public response to employment opportunities *vis-a-vis* the Corunna store largely paralleled that at the Bay Road facility. Thus, on Monday morning, November 30, MESC personnel handed out some 500 applications within the first few hours and there were still two to three hundred people on line. Huffman used the completed applications in telephoning and scheduling interviews for potential employees. He testified that he organized the applications by department and again separated the Kroger group from non-Kroger personnel. According to Huffman, after the "initial core" of experienced full-timers had been hired, he concentrated on staying away from Kroger applicants in arranging interviews.

The interviewing of applicants to staff the Corunna store commenced on Tuesday, December 1 (as testified by Huffman), or Wednesday, December 2 (as testified by Morris) and continued every day with the exception of Sunday, until Monday, December 7. According to Morris, he alone conducted all the interviews, although he acknowledged that Huffman was present. According to Huffman, he played a much more active role in the Corunna store hiring process than he had previously, actually conducting some interviews by himself (disputed by Morris). Huffman testified that Morris continued to ask ex-Kroger applicants (denied by Morris) regarding their opinion of the Union and about the failure of union concessions relative to the closing of the stores. With regard to interviews conducted solely by Huffman, he (Huffman) asserted, that he pointed out to all ex-Kroger applicants

that the stores would be non-union and that he questioned four or five of them about their union feelings. Further, Huffman testified that he told two ex-Kroger applicants, Gail Zedemont and Ricky Wisner (essentially corroborated by them), that he couldn't hire them because he was "very close" to fulfilling the "quota of Kroger personnel."[14] As testified by Huffman, throughout that week he was reminded by both Al and Tim Kessel not to come close to hiring half of Kroger's work force. Huffman testified that to help satisfy Kessel's concerns, he withheld the few remaining applications in his possession from ex-Kroger employees who had contacted him and gave the majority of them the "brush off."

According to Huffman, during the second week in December, Al Kessel continued to monitor the hiring of ex-Kroger employees. Thus, Huffman testified with corroboration from Meat Manager Bradley Wallen, that on Monday, December 7, Kessel questioned him at the Corunna store, in the presence of Wallen, about the number of ex-Kroger employees already hired. Huffman asserted that Kessel then directed him for the first time to lower the percentage of ex-Kroger employees from fifty percent to one-third or less of the total work force. Wallen, that week, had expressed anxiety over the inexperience of the meat department employees. However, Kessel, for his part, did not appear particularly disturbed and tried to reassure Wallen that matters were under control. Huffman and Wallen asserted, that Kessel stated, that he would not hire anyone from the Meat Cutters Union. While Kessel denied making any such statement, he acknowl-

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14. It is also alleged that Respondent, by and through its supervisors and/or agents, *Denise Henke*, *Meary Meacham*, and *Larry Schmidt*, made similar statements to potential employees.

edged that he tried to allay Wallen's fears regarding the inexperience of his subordinates. It is undisputed that no non-supervisory employee members of the Meat Cutter Union were hired in the meat department at the time the stores opened.

The two Saginaw stores opened on Wednesday, December 2. The Corunna store opened one week later, December 9, 1981. The Charging Unions picketed the stores from the date of the openings until November, 1982.[15]

2. Case No. 7-CA-21213

The hearing in Case No. 7-CA-20284 opened on September 20, 1982, and closed on October 7, 1982. In connection with that case, Richard Huffman and Bradley Wallen, two admitted statutory supervisors testified on behalf of the General Counsel and adversely to Respondent. While a parade of witnesses came to testify over eight days during the initial hearing, one day, Tuesday, September 21, was devoted entirely to the testimony of Huffman. As noted previously, Huffman, while still employed as the Corunna store manager, testified, *inter alia*, that Kessel had pressed him to limit the hiring of Kroger personnel in order to avoid "successor" obligations. According to Huffman, in compliance therewith, he, Huffman, concentrated on hiring non-Kroger applicants.

The evening of September 21, following Huffman's testimony, Al Kessel held a meeting of the Corunna supervisory staff. In addition to the department managers, Roy

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15. It is alleged, *inter alia*, that Respondent's supervisors and/or agents made coercive statements to some of the pickets in violation of Section 8(a)(1) of the Act. Further, it is alleged that Respondent subsequently refused to hire *Meardies Perry*, because she engaged in picketing. (Case No. 7-CA-21402).

Brody, director of store operations (Huffman's immediate superior), and Gregory Crawford, co-manager, were present. Kessel told those assembled, *inter alia,* that Huffman had testified on behalf of the NLRB and against Respondent. He discussed Huffman's testimony in general terms and characterized it to those present at this meeting, as reflecting "inaccurate recall." Kessel added that he had always trusted his "management people" but now didn't really know what was going on in the store. He invited his staff to "feel free" to come forward with information about Huffman and also Wallen, whom Kessel anticipated would similarly testify adversely to Respondent. Kessel instructed his staff to continue to treat Huffman as store manager but pointed out that the latter would no longer have access to the office and confidential data. According to Kessel, he no longer wanted Huffman privy to confidential material because he had heard that someone was providing such material to competitors and he now had reason to suspect Huffman.

On the morning of September 22, the day after Huffman testified, he reported for work as usual at the Corunna store, where he was greeted by Roy Brody, his brother Al Brody, and Huffman's assistant, Gregory Crawford. Brody and Huffman acknowledged that he, Huffman, was not to talk about the case to other store personnel. Brody then asked for and received from Huffman, the key to the store. Huffman was told by Brody that he no longer had access to any confidential material and to stay out of both the cash office and manager's office. Further, Brody advised Huffman, that because of these limitations, his brother Al Brody would "run the front end which is the office and vendor control" and assist him (Huffman), in running the store. Huffman testified that Al Brody fol-

lowed him around that day but later apologized for doing so, pointing out that he was following orders.

Huffman and Wallen were not scheduled to work on Thursday, September 23. That day, Huffman accompanied Wallen to the hearing in Flint, Michigan, where the latter testified adversely to Respondent, as Huffman had done, two days earlier. That evening, after Wallen had testified, he, accompanied by Huffman, went back to the Corunna store to check on the following day's work schedule. Soon after Huffman and Wallen arrived at the store, they were informed by Al Kessel that they were suspended with pay. Kessel instructed them to phone in every morning to learn about their employment status.

According to Kessel, he suspended Huffman because he assertedly attempted to intimidate Richard Garrett, a meat department employee at the Corunna store. Garrett informed Kessel on Wednesday evening, September 22, that Huffman told him earlier that day, "Don't fuck me or I'll fuck you." Kessel assertedly suspended Wallen because of the testimony of Richard Haney, another meat department employee. Haney testified on Thursday, September 23, that Wallen told him back in July, 1982, that the Union offered him $20,000 to testify against Kessel. Wallen denied receiving any bribe from the Union and denied further, that he told anyone of any bribe offer. In suspending Wallen, Kessel also considered Wallen's friendship to Huffman.

Between September 22 and mid-October, a number of department heads and employees reported to Kessel virtually everything that Huffman and Wallen did which they believed was not in the interest of Respondent. On October 14, 1982, one week after the hearing closed in Case No. 7-CA-20284, Kessel dispatched letters to Huff-

man and Wallen advising them that they were discharged, effective October 16, 1982. (Jt. Exh's. 7 and 8) According to Respondent, Huffman and Wallen were discharged because of "repeated acts of disloyalty" which Albert Kessel did not learn about until after they were suspended. The General Counsel on the other hand, ascribes both the suspensions and discharges to the adverse testimony provided by Huffman and Wallen and contends that Respondent thereby violated Section 8(a)(4) and (1) of the Act.

3. Case No. 7-CA-21402

In or around the fall of 1981, while Al Kessel was still employed by Hamady, President Dandy had directed him to explore the feasibility of acquiring three Kroger stores which were soon to close in the Saginaw/Corunna area. Further, Dandy expressed interest in the availability of five additional Kroger stores located in the Flint, Michigan area which he also expected to close. As noted previously, in November, 1981, Kessel had acquired the three store Kroger package for himself and terminated his employment relationship with Hamady. The five Flint area stores all closed on December 24, 1981. These stores were purchased by Kessel on April 30, 1982.[16]

In early May, 1982,[17] Al Kessel hired former Kroger managers Dave Kilbourne, Tom Larar, Tom Sawyer and Chuck Shinouskis to manage the same Flint facilities for

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16. While all eight stores (three Corunna/Saginaw and five Flint stores) were still owned and operated by Kroger, all hourly employees were encompassed by a much broader unit in the State of Michigan, under successive collective bargaining agreements with the Charging Unions, Local 40 (later became Local 876) and Local 539, the last of which by their terms expired on April 2, 1982 (G.C. Exh's 2 and 3).

17. All dates hereinafter refer to 1982 unless otherwise indicated.

Respondent.[18] All store managers were required to report directly to Roy Brody, director of store operations, a former Hamady official, whom Kessel had hired on May 2. Kessel had outlined for Brody, the desired employee profile to service the Flint area stores in much the same manner as he had with Morris with regard to the Saginaw/Corunna facilities. Thus, the core of the work force was to be comprised of experienced full-time employees supported by a larger group of part-time employees. With regard to part-timers, Kessel was more concerned with attitude in terms of servicing customers and appearance than experience. Kessel also told Brody that he preferred that the stores be non-union. Kessel and Brody shared these views with the newly hired managers at a meeting in Saginaw on May 7.

On Tuesday, May 11, Kessel caused to be placed a help wanted advertisement in The Flint Journal for virtually all positions in the five Flint area stores. (Jt. Exh. 6). The advertisement noted, *inter alia*, that applications would be taken the following day May 12, from 12 noon to 6:00 p.m. at the new Kessel store on Bristol Road, and identified the location as a former Kroger facility.

On May 12, the day of the mass application process, Al Kessel arrived at the Bristol Road store at around 10:00 a.m. By that time, a long line of applicants had already gathered all around the shopping center in which the store was located.

The store opened for the interviewing process to begin as scheduled, at around 12 noon but remained open until

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18. The parties stipulated that these individuals were statutory supervisors and agents as of May 7.

around 10:30 p.m., long after the 6:00 p.m. time set for the process to end. According to Kessel, this was done to enable everyone who appeared an opportunity to fill out an application and be interviewed. In all, some 1,200 applications that day were received by Respondent for approximately 400 unit positions and some 30 supervisory positions. Each applicant was provided an interview lasting a couple of minutes up to five minutes.

Meardies Perry, a former Kroger employee testified that during her May 12 interview, Al Kessel asked her (denied by Kessel), "Don't you think it (the closing of the Kroger store) was the Union's fault?" Daniel Lancto, another former Kroger employee testified that Tim Kessel asked him if he realized that the Flint area stores would be non-union. Tim Kessel denied discussing the Union with any applicants. Former Kroger employee Jeffrey Poissen testified without contravention, that Tom Sawyer asked him if he knew that "there was a chance they (Kessel stores) might be non-union" but added "it would be up to the employees after the store opened."[19]

Kessel asserted that Kroger applicants were to be given a preference and as such, he had his interviewers match and cross reference them with ex-Kroger managers who were now employed by Respondent. According to Kessel, he planned to have these applicants evaluated by Kessel managers who were familiar with their work.

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19. *Janet Colbern*, another former Kroger employee ascribed to *Roy Brody* a similar statement during an interview about one week before the Flint area stores opened. *Tom* and *Bruce Ketchum*, former Kroger employees, testified that *Al Kessel* told them in early May, that the Flint area stores would be non-union. According to the General Counsel, the reference to the Flint area stores as non-union and questioning of applicants regarding the Union's role *vis-a-vis* the closing of the Kroger stores violated Section 8(a)(1) of the Act.

This evaluation process of Kroger applicants took place on Sunday, May 16.

In attendance at the May 16 meeting were the four former Kroger managers (Kilbourne, Lazar, Shinouskis and Sawyer), Albert Kessel, his son Tim, and Roy Brody. Earlier, Tim Kessel had sorted Kroger applications from all other applications so that they could be assessed at this meeting. At the outset, Al Kessel told the former Kroger managers that the purpose of the meeting was to evaluate Kroger applicants and that he was going to "hire strictly" on their recommendations. Kessel testified that he pointed out that despite what they read in the newspaper, he was not concerned about a quota or percentage of Kroger applicants but rather "preferred" Kroger experience as a source for potential employees.[20]

The evaluation process consisted of rating each Kroger applicant, (one hundred and twenty in all), as excellent, good, only average or poor. Kessel listed on sheets of paper, the name of the applicant, the previous Kroger store in which the applicant was employed, and a separate heading or column for each of the four managers for their respective ratings along with special comments. (Resp. Exh. 31). Of the 120 applicants who were evaluated at the session, 79 were hired. (Resp. Exh. 37). Nineteen of them were hired into supervisory positions. All told, as of date the five Flint area stores opened, Respondent employed 395 unit employees and 37 supervisors.[21] (Resp. Exh. 25(a)-(e) and 37).

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20. The General Counsel contends that statements were self serving and made with an eye toward the complaint allegations in Case No. 7-CA-20284 dated March 16, 1982. (G.C. Exh. 1(m)).

21. The overall numerical breakdown in terms of percentages and ratios will be treated more fully *infra* in discussing the "successor" issue.

On May 23, the Respondent opened its five area Flint stores. The Charging Unions commenced picketing from the date those stores opened until November, 1982.

According to former Kroger employees Rebecca Green and Meardies Perry, in October, or November, 1982, Richard Knight, a Kessel co-manager, indicated to Perry that she couldn't be hired because she carried a picket sign. Green testified that Knight conveyed "bitter feelings" against the Union and told her that the stores would close "if the judge rules against Kessel." Knight denied the essence of the statements ascribed to him.

On November 3, the underlying charges in Case No. 7-CA-21402 were filed relative to the five area Flint stores, giving rise to a complaint dated December 10, 1982. According to the General Counsel, Kessel engaged in substantially the same misconduct with the Flint area stores as he had with regard to his Saginaw/Corunna facilities. A discussion follows.

B. Discussion and Conclusions

1. Credibility

(a) Principal Witnesses

General Counsel - Richard Huffman and Bradley Wallen

Respondent - Albert Kessel, Timothy Kessel, Sanford Morris, Richard Haney and Gary Rubelman

Early on, it became clear that many material facts were in dispute and that the major issues would turn on credibility resolutions. Thus, I actively participated in questioning witnesses where, *inter alia*, their responses were confusing or ambiguous taking special care to observe demeanor factors. I voiced my concerns, relative

to credibility, on the record, stating, *inter alia*, "I would expect respective counsel to devote time and care (in their briefs), in attempting to persuade me why one witness should be credited over another." In particular, they were asked to treat the plausibility of testimony as well as to point out whether witnesses testified against their "pecuniary and/or other self interest." This latter factor was underscored because few of the sixty-five witnesses could be said to have been purely disinterested in the outcome of the case. Of particular significance, was the testimony of Huffman and Wallen (admittedly statutory supervisors and agents), because they testified adversely to Kessel at a time when they were still employed by him, and therefore, ostensibly contrary to their own interests, a matter not to be lightly regarded. See e.g., *Narragansett Restaurant Corp.*, 243 NLRB 125, 129, n. 17 (1979); *Our Way, Inc.*, 238 NLRB 209, 214, n. 21 (1979), and cases cited therein.

Respondent adduced testimony tending to show that Wallen, and Huffman to a lesser extent, explored other employment opportunities while still employed by Kessel. Thus, Respondent argues, that as Huffman and Wallen were planning to quit, they were no longer in a vulnerable position and therefore neither testified against their pecuniary interest. Respondent also makes the serious accusation that Huffman and Wallen testified falsely because they were the recipients of bribes.

As it became evident that the case would turn largely on the credibility of Huffman and Wallen, I permitted the Respondent a wide latitude in cross examining them particularly where it related to the issue of whether said Huffman and Wallen testified adversely to their pecuniary or other self interest. I also permitted, over Gen-

eral Counsel's objection, the testimony of Ronald Frick, district operations manager for the Taco Bell Corporation, who testified that on August 29, he interviewed Wallen for a Manager Trainee position. However Wallen, after his initial efforts, exhibited little interest in that job. Thus, he failed to show up for three subsequent interviews, the last time on September 9. Wallen, who testified on September 23, denied that he had any intention of leaving Respondent at that time. Frick acknowledged that Wallen was never actually offered a job with Taco Bell.

In these circumstances, the fact that Wallen, from time to time, explored other employment opportunities is not tantamount to establishing that he had made definitive plans to leave his job. This is also true as it applies to Huffman. As such, I find little in the record to justify rejecting as a factor, in assessing overall credibility, that Huffman and Wallen testified against their pecuniary interest.

As for the bribery charges, Respondent relies mainly on the testimony of Richard Haney and Gary Rubelman, neither of whom impressed me as forthright, disinterested or reliable as witnesses.

Haney was employed in the Corunna store, in the Meat Department under the supervision of Wallen. He and Wallen met as co-workers at the Corunna store and had become friends. They were on the same bowling team and sometimes, after work, they would stop in at a bar together. According to Haney, in late June or early July, 1982, in the Meat Room at the Corunna store, Wallen told him that the Union (not otherwise identified) offered to pay him $20,000 to testify against Kessel. Haney was unsure as to how the subject came

up and little else was said about it at that time. He testified that about a month and one half later, Wallen told him that he, Wallen, knew enough to put Kessel out of business. According to Haney, Wallen told him at that time of a conversation with Huffman and Kessel where the latter spoke of the need to maintain a quota on ex-Kroger employees to keep the Union out. Wallen denied that these conversations occurred.

Rubelman was also employed in the Corunna store, as an hourly employee in the Produce Department. He spent evenings at the Shamrock Inn, a bar owned by a friend, where he asserted, that on one occasion in mid-June, 1982, he was engaged in conversation with Wallen. Rubelman testified that Wallen told him that, "The Union must be getting desperate, because they offered me $20,000 to testify against Al Kessel." According to Rubelman, he did not take Wallen seriously, commenting, "You've got to be shitting me." To this Wallen assertedly responded, "Hey, if you don't believe me, ask Rick Huffman; they offered him the same thing." Nothing else was said at that time. Rubelman testified that a couple of weeks later, Wallen told him in the Corunna store that Al Kessel better hope that he, Wallen, does not have to testify, because he "Knows enough to put Al six feet under." Wallen did not explain further nor did Rubelman question Wallen about this subject. Wallen denied receiving a bribe or telling anyone that a bribe offer was made.

According to Respondent, the General Counsel failed to establish any reason why Haney and Rubelman would lie. Respondent notes that both were fellow employees, the former, a friend and the latter, a former union member. Thus Respondent argues that neither Haney nor

Rubelman had reason to be biased against Wallen; neither had anything to gain. On the contrary, I find that the record disclosed a number of factors tending to suggest bias or self interest.

In Haney's case, the record disclosed that he was initially hired as the Meat Manager of the Corunna store at $400 a week. However, after only one day, Haney told company officials that he did not know enough to fulfill his managerial responsibilities. Respondent then demoted him to the Manager Trainee position at $300 a week but promised to restore him to the manager's slot when he acquired more experience. Indeed, Haney testified that he expected to be so promoted. In these circumstances, it would appear that Haney had much to gain by helping to remove Wallen as an obstacle to his own career development. After some nine months as a manager trainee, Haney would be ready to return to his original status and fill the slot left vacant by Wallen.

As for Haney considering Wallen a friend, I note that he, Haney displayed no visible displeasure in opining that his "friend" had a "very low" reputation for the truth. Haney testified that "[Wallen] can tell one person one thing, and he'll come back and tell somebody else something else. It's just hard to believe what he says most of the time." Given the likelihood of Haney's advancement in the company's hierarchy with the corresponding departure of Wallen, it cannot be said that the former was merely a disinterested witness whose testimony should be afforded greater weight because they were friends.

In discounting the friendship factor, it is also noted that Haney "volunteered" the information of the alleged

bribe offer to officials of Respondent. In doing so, and reflecting adversely on Haney's credibility, is the fact that he waited from two and one half to three months to pass this information on to Respondent. While during that same time frame, Haney dated a co-employee, the daughter of the police chief for the town of Corunna, he asserted that he did not reveal anything to them or anyone else about the alleged bribe offer. Haney maintained his silence for several months without any explanation although he acknowledged that he understood that a bribe offer was illegal. These factors further militate against the reliability of Haney as a witness. As noted above, Haney had much to gain by aligning himself with Respondent. Haney's identification with Respondent was further manifest by his reference on cross-examination to Mr. Martin, counsel for Respondent as "my attorney." In short, I reject Haney's testimony in critical areas as not reliable or credible.

As for Rubelman, I also found him not to be credible as a witness. For example, his account of his employment interview is not only implausible but disputed in part by Morris, a key Respondent witness.

According to Rubelman, he was interviewed solely by Huffman with no one else present. Rubelman testified that during the interview session, he volunteered that he was a former union member and once served as a shop steward while employed by Giant Supermarkets. He explained that he introduced the subject of his union activities because "I felt that would have a bearing on whether I was hired or not." Huffman assertedly reassured Rubelman that he need not be concerned about his previous union activities because Respondent was under no quota restriction with regard to union people.

Contrary to Rubelman, both Morris and Huffman mutually corroborated each other to the extent that they confirm their respective presence at Rubelman's interview. Further, Morris denied any discussion relative to Rubelman as a former shop steward. In any event, it defies logic for Rubelman to raise the subject of his former union service to enhance his hiring prospects, where, as here, he believed that Respondent was a non-union operation. In rejecting Rubelman's testimony as implausible, it is also noted that there is nothing in his resume or employment application remotely suggesting that he once served as a union steward. On the other hand, Rubelman's resume reveals, *inter alia*, that in his most recent job, "I also served as the *company representative* for all union matters . . ." (emphasis added, G.C. Exh. 10(c)(46)).

As with Haney, it is noted that Rubelman waited months before disclosing to his superiors what Wallen assertedly told him regarding the bribe offer. This unexplained delay, particularly by one experienced in representing management in labor-management relations, tends to severely undermine his credibility. It is noted that Rubelman was unemployed for approximately nine months before finally securing a job with Respondent. Perhaps Rubelman seized upon the alleged bribe idea as a way to curry favor with his new employer. In any event, I reject Rubelman's testimony as not credible.

Aside from the rejected testimony of Haney and Rubelman, there is a dearth of probative evidence tending to support Respondent's bribery charges. Thus, the record is silent with regard to the name of the union or unions involved in the alleged bribe offer as well as the identity of the alleged briber. On the other hand, the presidents of Locals 539 and 876 (the Charging Unions) testified,

without contradiction, that they had no knowledge of any bribe offers. It is also noted that the financial records of Huffman and Wallen were subpoenaed by Respondent but nothing was offered in evidence with regard thereto to support the bribe theory. Nor was additional time requested to investigate and/or assess these records more fully. While I treated the bribery charges as made in good faith, I am unwilling, in the absence of concrete or probative evidence, to rely on conjecture or speculation to sustain accusations of such a serious nature. Conversely, I credit the denials by Huffman and Wallen and have otherwise found them to be credible witnesses in material areas for reasons discussed below.

Huffman was clearly the principal witness on behalf of the General Counsel. As a store manager, he testified adversely to Respondent from an insider's perspective. By virtue of that position, Huffman had a proximity to Kessel where he could be expected to learn directly about Kessel's intentions and motivation.

It is undisputed that even while Huffman was being recruited by Morris, on behalf of Kessel, and before any of the Kroger stores were purchased, he was advised that Respondent would operate on a non-union basis. According to Huffman, to accomplish this, Al Kessel, *inter alia*, directed him to limit the number of ex-Kroger employees to be hired from one third to less than fifty percent.

Huffman testified that on Friday, November 27, his first day in the employ of Respondent, Kessel had advised him, *inter alia*, that he had already hired the initial or central core of his staff (comprising supervisors and full-time employees) for the two Saginaw stores and instructed Huffman to concentrate on filling the remaining positions with non-Kroger personnel. Those remaining vacancies,

for the most part, were for cashiers and courtesy clerks, largely part-time positions. Huffman testified that earlier that evening Al Kessel's son, Timothy, had given him approximately 100 applications to screen and from which to call and schedule interviews for the following day. According to Huffman, in order to comply with Kessel's orders to concentrate on hiring non-Kroger personnel, he divided the applications into Kroger and non-Kroger piles, placing an "X" in the upper right hand corner of all Kroger applications. Huffman asserted that he called only non-Kroger applicants (from applications without an "X" mark) for interviews while disregarding the Kroger file.

Respondent disputes Huffman's account of the "X's" contending that the "X" mark was placed on applications only by Morris and Timothy Kessel and not by Huffman. According to Morris and Timothy Kessel, they had decided early on to place an "X" on applications they would no longer consider, where their efforts were unsuccessful in contacting the applicant or the applicant was not acceptable for employment.[22] They denied that the "X" mark was related to Kroger employment. Timothy Kessel also asserted that he had given Huffman the disputed applications on Saturday, November 28, and not on the previous day as testified by Huffman.

Contrary to Respondent, I find merit in the General Counsel's contention, "The fact that others utilized "X's" does not negate Huffman's testimony that he developed this system for himself." In this connection, it is noted

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22. *Timothy Kessel*, when asked who initiated the "X" responded, "It would have been Mr. Morris' or mine. I don't recall. That was just what we started to do. I don't recall specifically whether it was him or myself." Kessel's uncertainty may have also reflected a lack of candor. In any event, I did not find him to be forthright or credible as a witness.

that Huffman was not told of the Morris-Kessel system, nor did he reveal his system to them. This would certainly help account for the different conditions that prevailed relative to "X's" on the applications.[23] Thus, I am unpersuaded that Huffman testified falsely because Respondent contends and the record disclosed that some applications of former Kroger employees who had applied for cashier positions and were not hired are without an "X" and applications of former Kroger employees who did not apply for cashier positions were marked with an "X".

According to Timothy Kessel, on Friday, November 27, he had taken the applications from the Bay Road store and kept them in his room that night at the Holiday Inn. He denied that he had given any of the applications to Huffman until the following day. Morris on the other hand recalled that Huffman helped sort those applications on November 27. Moreover, Morris recalled that Timothy Kessel interviewed cashiers on November 28. Morris' testimony in this regard would tend to corroborate Huffman's account that he called cashier applicants on Friday, November 27 to set up interviews for the following day. Given the total circumstances, noting *inter alia*, that Timothy Kessel as Vice President and son of the owner and Respondent was not a disinterested witness and that I found Huffman to be plausible and credible for additional reasons noted below, I credit Huffman's account over the version provided by Timothy Kessel.

Still during the evening of November 27, in a room at the Holiday Inn, Huffman testified that Al Kessel declared to members of his new managerial staff, "No way in hell

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23. The record disclosed that 57 of the several thousand applications which were submitted contain an "X" mark. (Resp. Exh. 15)

did [he] want the fucking union to have penetration into the stores, because if Kroger could not have survived in that area with union representation, there's no way Kessel stores could." While Al Kessel, his son Timothy Kessel and Morris denied any such statement, they clearly were not disinterested witnesses.[24] Timothy Kessel could not recall seeing Huffman at that time although it is noted that Huffman's presence was confirmed by Morris. On the other hand, Huffman also placed Terry Smith, manager at the State Street store, and Larry Schmidt, manager of the Bay Road store in the room at the time the alleged critical statement was made, but Respondent did not call either one as a witness, and offered no explanation for its failure to have them testify. In these circumstances, I deem it appropriate to draw an inference that their testimony would have been unfavorable to Respondent. See, *Martin Luther King Sr. Nursing Center*, 231 NLRB 15, n. 1 (1977).

Huffman credibly testified that later that same evening (still November 27), in the privacy of Al Kessel's car, in the Holiday Inn parking lot, the latter had denigrated Richard Phillips, the president of Meat Cutters Union, Local 539, and ordered Huffman not to hire anyone from that union. According to Al and Timothy Kessel, on the

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24. In *Morris'* case, the record disclosed not only that he and *Al Kessel* were long time colleagues when employed by Hamady, but that the former was also a confidant to *Al Kessel*. Thus, *Morris* testified that back around April, 1981, *Kessel* had disclosed his interest to form his own business and invited *Morris* to join him as a partner. While *Morris* rejected that idea, he promised *Kessel* that he would always make himself available to help get him started. This came to pass in November, 1981 when *Morris* again turned down a partnership offer but kept his promise to help get *Kessel* started and executed a consulting agreement. (Resp. Exh. 4). While the foregoing, by itself, clearly does not serve as a basis for rejecting *Morris'* testimony, it does tend to militate against Respondent's contention that *Morris* was a disinterested witness.

evening of Saturday, November 28 (not on November 27 as testified by Huffman), the senior Kessel looked in on his son and Huffman in their adjoining rooms at the Holiday Inn to check on their progress. Timothy Kessel, assertedly stepped outside the room and complained to his father that Huffman, *inter alia*, was spending too much time on the phone setting up interviews.

It is undisputed that Al Kessel had his son summon Huffman for a private meeting in the senior Kessel's car. The critical dispute is over the subject of that private meeting: Whether Kessel made anti-union remarks, as testified by Huffman; or, whether Huffman was admonished regarding his handling of the phone calls, as testified by Kessel. I find Huffman's account more plausible. I find the fact that Respondent did not hire Kroger Meat Department employees from any of the three Saginaw/Corunna stores for unit positions is fully consonant with the remarks Huffman ascribed to Kessel relative to the Meat Cutters Union, Local 539.[25]

I can discern little need for the privacy of Kessel's car, if the disputed conversation merely related to Huffman's handling of the phone calls. Rather, it is more likely that privacy was needed, if as testified by Huffman, the subject related to Kessel's anti-union animus. Further,

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25. According to *Kessel*, his "first choice" was "Kroger Meat Department employees. They just didn't apply." I find however, that *Kessel's* asserted preferance, *vis-a-vis* ex-Kroger employees is hardly supported by probative or credible evidence. The record disclosed that there were twenty openings in the Meat Departments of the Saginaw/Corunna stores for which four ex-Kroger employes applied: *Thomas Boland* (G.C. Exh. 11B-5), *Marlene Kleinbriel* (G.C. Exh. 11B-22), *Douglas Ochodnicky* (undisputed testimony), and *Robert Shaler* (G.C. Exh. 11B-48). None of the aforenamed applicants were hired and I am not persuaded by credible testimony, that Respondent made any genuine effort to reach any of these applicants.

I find highly unlikely, that if Timothy Kessel had complaints about Huffman, that the former, as a vice president and son of the owner, would not have taken a moment to tell Huffman directly, particularly, where, as here, they worked in adjoining rooms and could hear each other. Admittedly, this was not done.

I also credit Huffman over Morris where their testimony is in dispute. Huffman asserted that at an orientation breakfast with Morris on November 27, the latter advised him to limit the number of former Kroger employees to be hired. According to Huffman, Morris told him that Kessel was fearful that a "majority" of Kroger personnel might lead to unionization and "the store would have no chance for success." While Morris admittedly outlined the criteria in hiring on that occasion, he denied that anything was said regarding union considerations. According to Morris, he told Huffman, *inter alia,* that Kessel was not going to strictly follow the Kroger 'system' and that he, Huffman, would be "responsible for making this thing click or there won't be a job for anyone."

In not crediting Morris, it is noted, *inter alia,* that he acknowledged on cross-examination that if he were talking to Huffman, "the primary difference" between the Kroger and Kessel operations is that under Kessel, there would be no union. In these circumstances, I find it highly unlikely that Morris would tell Huffman that "Kessel" would not be operated as "Kroger" without also making a reference to the Union when by his own admission, the "primary difference" is that Kessel would not have a union. It makes little sense for Morris not to have said anything about the union, particularly when, by his own admission, he informed Huffman as early as November 13 that the

stores would be operated on a non-union basis. Further, Morris' credibility is not enhanced by his assertion that he asked Kessel on November 14 whether he intended to operate with a union and was assertedly told for the first time that Kessel had a preference that the stores be non-union. I find incredulous, as testified by Morris, that he told Huffman on November 13 that Respondent would be non-union although Morris assertedly did not actually learn of Kessel's preference until he asked Kessel on November 14. Further undermining the reliability of Morris' testimony is his equivocal response as to why he made such an inquiry of Kessel. Morris responded, "For my own edification. I can't really say why I asked that question."

As noted above, I found Huffman to be a credible witness. He testified on four separate occasions and once for an entire day. The cross-examination was skilled and gruelling. Respondent, recognizing the critical nature of Huffman's testimony, paraded a host of witnesses for impeachment purposes. In these circumstances, it is not surprising that his testimony is not without some confusion or minor inconsistencies.[26] However, in the main, I found Huffman to be candid and his testimony in critical areas to be consistent and plausible, particularly in the context of Kessel's history at Hamady.

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26. For example, *Huffman* first testified that former Kroger employee *Patricia Masser* requested a job application *before* the Corunna store opened. *Masser* denied that she had any contact with *Huffman* relative to an application *before* the Corunna store opened. *Huffman* later acknowledged that *Masser* sought an application *after* the store opened. He explained that he thought the question initially pertained to the period just before and after the store opened. In any event, given the huge number of applicants at around the time of the store's opening, I do not deem *Huffman's* error as a material basis for casting doubt on his credibility.

The record disclosed that Kessel had long been familiar with the principles of successorship. While at Hamady, Kessel expressed the view to company officials that neither the Hamady-union contracts nor the Kroger-union contracts obligated Hamady to operate Kroger stores (which were about to be acquired by Hamady), as union facilities. While this by itself, is of little consequence or materiality, it is also noted that Kessel recommended opening these stores on a non-union basis. Kessel admittedly had been advised by Howard Grossman, a labor attorney for Hamady, that by hiring a majority of Kroger's employees from the acquired stores, it would obligate Hamady to recognize the unions.[27] Kessel told Hamady officials that they were not obligated to give preference to Kroger personnel. However, Kessel's position and recommendations were rejected by other Hamady officials. As stated by Morris, "I guess we voted against doing what [Kessel] suggested."

It appears that Kessel's expectations for a viable retail supermarket operation could be realized, as perceived by him, only if he were unencumbered by union considerations. To Kessel, it was central to his business, that he have a free reign with regard to wages and other

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27. *Norman Griffin,* currently vice president, personnel and labor relations for Hamady, credibly testified, *inter alia,* that *Kessel* had recommended that they hire less than a majority of Kroger's employees to avoid any obligation to recognize and bargain with the Union. As noted previously, the record disclosed ongoing civil litigation between Hamady and Kessel. While it may be that *Griffin* was not a disinterested witness, there is no showing that he was involved in the aforenoted litigation. It is also likely that *Griffin* was mistaken when he denied that he attended a farewell party for Kessel. On balance however, I found his testimony largely corroborated by *Grossman* and *Kessel* as well as plausible, particularly as *Kessel* recommended that Hamady look elsewhere for its employees and open up the stores on a non-union basis. In view of the foregoing and on my observation of demeanor factors, I credit *Griffin* in material respects.

terms and conditions of employment, at least, initially.[28] Thus, Kessel admitted, that if he had to deal with a union, he would not have acquired the Kroger stores unless he had, "the benefit of establishing the package or hiring the people." While such a view, by itself, is not unlawful, it does tend to show that union considerations were central to his operation and that he would so advise his subordinates as testified by Huffman.

In assessing Huffman's overall credibility, I made special note of his candor. For example, Huffman acknowledged that in July, 1982, in a private meeting with his superior, Roy Brody, the latter had been justified in criticizing him for not fulfilling his overall managerial responsibilities. Huffman testified that Brody pointed out that he was not getting enough production from his subordinates because of the "stupid" way in which he worked their schedule. He and Brody got into an argument and the latter threatened to transfer or replace Huffman with another manager unless conditions in the store improved. However, before the meeting ended, a certain calm ensued and Brody helped Huffman rewrite the schedule. That was the last time Huffman was threatened with transfer or removal. Brody admitted that Huffman showed improvement and that by mid-August conditions were "much better." In fact, at the time Brody testified, conditions in the Corunna store were "fine" and on "par" with the

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28. According to *Alex Dandy*, president of Hamady, *Kessel* complained that union rates were too high and that the only way to make money from the 21 Kroger stores would be to open them non-union. While *Dandy's* testimony in this regard tends to square with the record, I found that too often he was evasive, unresponsive and clearly not disinterested. In this latter regard the record disclosed that he is deeply involved in outstanding litigation alleging, *inter alia*, misconduct by Kessel, as a Hamady official with regard to the purchase of Kroger stores for himself. In short, I do not rely on *Dandy's* testimony.

other stores. In these circumstances, it is not likely that Huffman fabricated his testimony out of fear of losing his job because of poor performance.

While Huffman testified adversely to Kessel, he also noted that a "majority" of Kroger employees at the interviews were unhappy with the Union. As such, I find Huffman's account and assessment of Kroger applicants regarding their union animus, also reflects favorably on his candor. He testified as follows:

> I would say that the majority of them were very angry with the Union. The majority of them felt that the Union did not allow them to take concessions. And it was my general impression that these applicants were just angry at the Union, and they would be glad to work in a non-Union store. They just wanted to work.

As for Huffman's reasons for testifying, particularly as I am persuaded on the state of this record, that he testified against his pecuniary interest, I find them plausible and worthy of acceptance. Huffman asserted that he "set certain values" for himself and for his family. He contacted the Union about two weeks before the trial because in his words "I was afraid that if I did not come forward, that I would be called by Kessel lawyers, and I might be forced to perjure myself, and I didn't want to do that."

According to Huffman, he had lied when he initially told counsel for Respondent, in preparation for trial, that he did not discriminate with regard to hiring practices because he believed that it was expected and he was fearful of losing his job. While he was no less fearful of losing his job at the time he testified, it appears that the fear

or abhorrence to commit perjury was the great equalizer. I accept that, and as such, and on the basis of the entire record, I credit his testimony.

As noted previously, I have also found that Bradley Wallen testified credibly in material respects. The essence of Wallen's testimony deals with anti-union statements ascribed to Al Kessel as well efforts by said Kessel to monitor hiring at the Corunna store.

It is undisputed that Wallen had expressed to Kessel that he was troubled over the inexperience of his subordinates in the meat department. Wallen with corroboration from Huffman credibly testified that he urged Kessel to hire journeymen meatcutters but the latter stated that he would not hire anyone from the Meat Cutters Union. Kessel denied that he made any such statement. Moreover, Kessel asserted that Kroger employees with meat department experience were actually his "first choice" but they didn't apply. As noted previously, Kessel's assertion regarding a first preference for Kroger employees (all members of the Meat Cutters Union) is not supported by credible evidence. (See n. 25 *supra*).

As for Kessel's denials of the statements ascribed to him by Wallen, in rejecting them, it is noted for reasons discussed previously, *inter alia,* that he was not otherwise plausible, reliable or credible. On the other hand, Wallen's testimony *vis-a-vis* Kessel, *inter alia*, was substantially corroborated by Huffman, who, as noted above, impressed me as a most reliable and credible witness.

(b) Other Witnesses

As noted previously, the General Counsel contends that Respondent limited the number of "Kroger" applicants to be hired to avoid "successor" obligations. In

support thereof, *inter alia*, the General Counsel adduced testimony from Yolanda Ortega, her daughter Patricia Kubik, James McLaren and Douglas Ochodnicky ascribing certain statements to Larry Schmidt, a store manager, and supervisors Denise Henke and Mary Meacham.

According to the aforenamed witnesses, on November 27, at the Bay Road store, Manager Larry Schmidt told them, as well as four other "Kroger" applicants, collectively in a group, that they were as good as hired and that they need not fill out applications. It is undisputed that they were told to write their names, phone numbers, the job sought and experience on yellow pad paper and that they would be contacted by phone. The only one contacted and hired was Linda Graves, and she was hired the very next day. Graves testified on behalf of Respondent.

According to Graves, it wasn't Schmidt who spoke to the group, but Co-Manager Gary Gwizdala. While Graves confirmed that they were told that it wasn't necessary to fill out applications, she denied that Gwizdala had given them any assurances that they would be hired. Neither Schmidt nor Gwizdala testified. I credit General Counsel's witnesses over Graves for reasons discussed hereinbelow.

It is undisputed that Denise Henke, front end supervisor, favored this group of eight applicants because they were her friends and/or co-workers at Kroger. As testified by Henke, this was done with the permission of Manager Schmidt by sneaking them into the store through the back entrance, thereby bypassing many applicants who were in front of them on line, awaiting the hiring process to commence. Henke's reference to attaining permission from Manager Schmidt tends to support the account provided by the General Counsel's witnesses at least insofar

as establishing a nexus between Schmidt and the group. Graves' difficulty with Gwizdala's name also tends to cast some doubt that her identification of him was accurate. Thus Graves testified that the co-manager's name is "Gary Wasneli, or something along that line. I'm not really certain about his last name." In contrast, Sally Ortega testified without contradiction that she recognized Schmidt from her recent employment at Kroger's Euclid store. Even Graves testified that once inside, Henke told the group to "talk to the manager." This reference to "manager" and the linkage to Schmidt persuade me that said Schmidt spoke to the group as testified by the General Counsel's witnesses. In this regard it is also noted that Respondent failed to call either Manager Schmidt or Co-Manager Gwizdala to rebut the testimony ascribed to the former.

As for Graves otherwise as a witness, it is noted that at times she was inconsistent, evasive, unresponsive and in conflict with Henke (Respondent's other witness). Thus, it is noted, *inter alia*, that while Henke admitted that she told the group that she had been hired as front end supervisor, Graves denied that Henke said anything about her position with Kessel. In short, I did not find Graves credible as a witness.

Ochodnicky testified that on December 22, after the Bay Road store had opened, he went back to that store and questioned Schmidt as to why he hadn't been hired. According to Ochodnicky, Schmidt denied that he promised to hire him but also pointed to the Union pickets outside the store as a reason why he couldn't do anything for him at that time. Ochodnicky also testified that Schmidt told him that he had to hold the number of Kroger employees to under 50 percent to avoid dealing with the Union. How-

ever, he assertedly suggested that Ochodnicky fill out a formal application which was done within the hour. (Resp. Exh. 5).

In assessing Ochodnicky's credibility, it is noted that he was confused, inconsistent, implausible and clearly mistaken about dates. For example, Ochodnicky first testified that he went back to the Bay Road store to see Schmidt two days after the "group" meeting of November 27. While Ochodnicky asserted that on the same day he submitted a job application, the date thereon is December 22. He explained his confusion stating, "The only reason I say it was before Thanksgiving is because I remember them marking up turkeys . . . maybe it was before Christmas . . ." However, still later, Ochodnicky reverted to his earlier testimony, to wit, that he saw Schmidt two days after the initial meeting and that he submitted an application about one half hour after that second meeting.

Given the fact that Ochodnicky identified his signature on the application, I find no basis for rejecting the date thereon (December 22) as inaccurate. As such, and as Ochodnicky was otherwise unimpressive as a witness, and in the absence of other credible corroborative testimony, I find no reasonable basis to credit his account. In arriving at this conclusion I find that Schmidt's failure to testify so heavily relied on by the General Counsel is insufficient to overcome the above-described impediments to Ochodnicky's reliability as a witness. Accordingly, I reject Ochodnicky's account of his private meeting with Schmidt.

It is undisputed that McLaren phoned Henke at the Bay Road store soon after the disputed group meeting with Schmidt and inquired about his hiring status. According to McLaren, Henke told him that she was sorry but that

the company had filled its quota of Kroger employees. Henke denied saying anything about a quota or that she made any reference to Kroger. According to Henke, she told McLaren that she didn't have anything to do with hiring and pointed out that she was certain that since his application was on file, it would be considered in the future. As for McLaren's response, all Henke recalls is that he said, "Oh" and sounded disappointed. I reject Henke's account as implausible and incredible.

It is undisputed that McLaren had not submitted an application as he and other members of the so-called "Kroger" group were told that it was not necessary. In these circumstances, it would appear most likely that if, as testified by Henke, she gave McLaren some hope for future employment based on his application (supposedly already on file), McLaren would have corrected her or what [sic] have said something other than "Oh".

Respondent assails McLaren's credibility on the basis that he was a paid union picket. While McLaren was not a disinterested witness and potentially may derive a benefit if the case is decided against Kessel, this by itself, hardly disqualifies him as a truthful witness. Rather, I find other factors in the record are more persuasive in assessing McLaren's credibility. I find that his testimony is generally consistent, plausible and substantially corroborated, particularly with regard to the group meeting with Schmidt on November 27. As I was also impressed with McLaren's demeanor, I find that he testified credibly.

On the other hand, I found Henke, vague, evasive, implausible and sometimes inconsistent. With regard to the last of the aforenoted factors, it is noted, *inter alia*, that while Henke admittedly told the group on Friday, November 27, that she was hired as front end manager or

supervisor, she also testified that the decision that she was to hold that position was not made until Saturday, November 28.

Under all the circumstances, including demeanor factors, I credit McLaren over Henke where their testimony is in dispute.

It is undisputed that in late November, Bonnie Flateau phoned Mary Meacham, her former Kroger colleague, and asked her about her chances of receiving a job with Kessel. Flateau testified that Meacham told her, "not to be disappointed if I wasn't hired, because [Kessel would] only be able to take a certain percentage of Kroger people, otherwise he'd be in trouble with the Union." Meacham denied making that statement.

Respondent contends that Flateau was biased and not a credible witness because, *inter alia*, "[she] would personally benefit from any decision ordering Kessel to offer her a job or pay damages to her." Respondent also points out that Flateau has been actively engaged in picketing Respondent's stores and as "picket captain" has earned money more than other pickets for such activities. Moreover, Respondent denies that Meacham was a supervisor at the time of the conversation with Flateau and therefore, "the alleged statement, even if made, would not be binding on Respondent."

As noted previously, only a few of the sixty five witnesses to testify on behalf of the respective parties were disinterested in the pure sense or did not have any stake in the outcome of this case. According to Respondent, "Meacham [unlike Flateau], has no reason to be biased or to slant her testimony." I see the circumstances differently.

First off, it is noted that several thousand applicants expressed some interest in working for Respondent for a limited number of jobs. The Meacham family appeared to be among the fortunate. In addition to Mary Mecham, Kessel also hired one son, two daughters, and a son-in-law. It is also noted that her son-in-law's father is a co-manager in one of Kessel's stores. Meacham herself was hired as a supervisor in the State Street store, the same position that she held for Kroger. Thus, instead of a 15 mile drive to the Euclid store where Meacham had transferred after the State Street store closed, she now had only a five minute commute. Given this backdrop, Meacham could well consider herself indebted to Kessel. This may explain Meacham's strange response to Kessel's inquiry relative to Greg Ortega as a potential employee. Meacham prefaced her recommendation by asking Kessel, "Do you want the truth or do you want the lie?" When Kessel assertedly told Meacham that he wanted the truth, she recommended against hiring Ortega. This type of equivocal response suggests a willingness to be less than forthright.

Overall, in addition to finding Meacham less than forthright, I found her at times, vague, evasive and inconsistent. For example, she first testified that she told Timothy Kessel that she could not be reinterviewed on Saturday because she had to work that day. Later, Meacham testified that the given Saturday was her day off.

On the other hand, I found Flateau generally consistent, responsive and plausible. In this regard, it is noted, *inter alia*, that the statement she ascribed to Meacham is consistent with similar statements emanating from other members of management. While neither Flateau nor Meacham were disinterested, a total assessment including

demeanor factors persuades me that the former testified truthfully. In short, I credit Flateau over Meacham where their testimony is in conflict.

I also find that Meacham at all times material herein, was a supervisor and/or agent as alleged. The parties stipulated, the record disclosed, and I find that Meacham was hired by Respondent on November 21 as front end manager, a statutory supervisory position, that she commenced work on November 23, and was a statutory supervisor on December 2, when the State Street store opened. In dispute is Meacham's supervisory status in late November, before the store opened when she had the conversation with Flateau.[29]

In finding that Meacham was a statutory supervisor and/or agent during the disputed period, it is noted, *inter alia,* that she was already engaged in a number of managerial functions. Thus the record disclosed that on November 27, Kessel had provided a buffet dinner for his managerial staff which included Meacham. On that occasion Kessel tapped both Meacham and Henke for input in deciding whether to hire certain employees. In connection therewith, it is noted that Kessel adopted Meacham's recommendation that he not hire Greg Ortega.

The record also disclosed that in late November, Meacham, as Head Cashier, a supervisory position, was involved in training and testing cashier applicants and her recommendations in the hiring process were generally followed. Flateau testified credibly, without contradiction, that Meacham told her that she had been hired as

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29. *Meacham* testified without contradiction, and I find that the conversation actually occurred on Sunday night, November 29.

Head Checker. As such, Flateau called her friend and former Kroger colleague to inquire about her chances for a job because, "I figured she would know."

In view of the foregoing, noting particularly, that Meacham told friends and prospective employees that she was hired as a supervisor; that she was significantly involved in the hiring process; and, that Respondent treated her as a managerial employee (e.g., buffet dinner), I find that Respondent was responsible for her statements to applicants involving the company's intentions, although the store had not yet opened and she was not then exercising the full range of her supervisory duties. See e.g., *Marsellus Vault & Sales, Inc.*, 170 NLRB 898 (1968). On the other hand, the evidence falls far short of establishing that Meacham was Respondent's agent while she was still employed by Kroger. Thus, I find that certain statements ascribed to Meacham by David Dickerson which were allegedly made while both of them were employed by Kroger, are immaterial and not binding on Respondent.[30]

2. Section 8(a)(1) Allegations

(1) Non-Union Statements

The credited testimony disclosed that Respondent, by Al and Tim Kessel, Roy Brody, Sanford Morris, and one or two lesser officials informed ex-Kroger applicants that the stores would operate non-union. However, without more, in the circumstances of this case, I am unpersuaded that such statements are coercive or otherwise violate Section 8(a)(1) of the Act.

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30. Still other credibility resolutions are unnecessary, as merely cumulative, or will be treated as the principal allegations are discussed *infra*.

It is noted that Respondent had not assumed Kroger's contractual or other union obligations and as such, and in the absence of any "successor" obligations (none found herein to exist), it was free to commence operations as it had noted to applicants, on a non-union basis. See, generally, *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). Moreover, I am not persuaded that it was Respondent, rather than the applicants who first made reference or posed the question as to whether Respondent would operate non-union. For example, Kroger employee David Dickerson admittedly introduced the subject of the Union by asking Morris during his interview whether the stores would be non-union. Kroger employee Thressa Porter also testified that she had inquired of Morris as to whether the company was union or non-union. Former Kroger employee Janet Colburn noted that so much time had passed since she had her interview with Roy Brody that she was uncertain whether she or Brody had first raised the subject of the Union. Brody asserted that he merely responded to Colburn's question. In any event, Colburn acknowledged that while Brody told her that the stores would open non-union, he also told her that "it would be up to the employees later if they wanted [a union]." Similarly, former Kroger employee Jeffrey Poisson testified that while Store Manager Tom Sawyer told him at his interview that there was "a chance" that Respondent would open non-union, that the latter also told him that "it would be up to the employees [whether they wanted a union] after the stores opened up."

In the absence of any finding that Respondent was obligated to recognize and bargain with the Union at the time it opened any of its stores, and assessing the allega-

tions in context, I find that the General Counsel has failed to establish by the weight of the evidence that the non-union status statements were coercive or otherwise violative of Section 8(a)(1) of the Act. Accordingly, I shall recommend that these allegations be dismissed.

(2) Interrogation

It is undisputed that Kessel applicants who were employed or previously employed by Kroger were questioned by Respondent's interviewers, mostly Morris, as to why they believed the Kroger stores closed. The General Counsel contends, "this question was designed to reveal the applicants' Union sympathies." According to Morris, in asking this question, he had relied on the same interviewing technique that had been developed at Hamady's. Thus, Morris testified as follows:

> Well that was a question that we had developed when we were with Hamady's that we used when we discussed the Kroger people over in the western side of the state when we purchased these stores, and our reason for using that question is, we wanted to determine how the applicant felt about their self. Did they not try to blame the closing off on all types of other people and would they accept the responsibility their own self? It gives you a feel of, can this applicant get off the ground and get going on their own?

I find Morris' explanation regarding his question as plausible and as such, his inquiry had a legitimate business purpose. While the credited testimony also disclosed that Morris, Al Kessel, and Huffman asked some applicants with Kroger experience about their attitudes toward the Union, in context, the inquiry appears to be related to

the reasons Kroger went out of business rather than calculated to ferret out union supporters.

As noted previously, a majority of the former Kroger employees expressed bitterness toward the Union for failing to grant concessions and held the Union responsible for the stores closing. Yet, there is little evidence tending to show that any of this bitterness harbored against the Union enhanced the employability of these former Kroger employees. Rather, as noted previously, and as will be discussed more fully *infra*, the record disclosed that Kessel was principally concerned with avoiding "successor" obligations so that he could set the initial terms and conditions of employment. To accomplish this, he closely monitored the hiring of Kroger employees in terms of numbers and percentages and not whether they were for or against the Union.

The Board now holds that not all forms of interrogation is per se violative of Section 8(a)(1) but only that which reasonably tends to restrain, coerce, or interfere with the exercise of rights guaranteed by Section 7 of the Act. See, *Rossmore House*, 269 NLRB No. 198, sl. op. at p. 4 (1984). Applying this standard to the instant case, I find that under all the circumstances, the General Counsel has not established that the interrogations herein tend to restrain, coerce or interfere with employees' rights guaranteed by the Act in violation of Section 8(a)(1). Accordingly, I shall recommend that these allegations be dismissed.[31]

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31. *Dickerson* credibly testified that *Morris* asked him how he felt about crossing a picket line.– In assessing whether *Morris'* inquiry was violative of the Act, it is noted, *inter alia*, that *Dickerson* admittedly introduced the subject of the Union at the interview. Further, the inquiry did not appear to have any connection with *Dickerson's* unsuccessful attempt to gain em-

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(3) Statements on Quotas or Limitations Concerning the Hiring of Kroger Employees

As noted above, the credited testimony disclosed that Al Kessel intended to open his stores non-union and took steps to avoid "successor" obligations. Huffman credibly testified that Kessel revealed his intentions during the evening of November 27 at the Holiday Inn, when he welcomed members of his managerial staff and cautioned them, *inter alia,* to be careful not to approach fifty percent in the hiring of Kroger's work force. Kessel repeatedly reminded Huffman of this hiring constraint over the next two weeks. Given the massive number of applicants, it is not surprising that a few of them were told of the quotas or parameters governing the hiring of ex-Kroger employees, even if only to mollify them or as testified by Huffman to get them off his back. Thus, a credited composite of admitted testimony disclosed that Huffman told ex-Kroger employees Ricky Wisner and Gail Zedemont in early December, 1981, in separate conversations, *inter alia,* he couldn't hire them because he was already close to a fifty percent limitation in hiring ex-Kroger employees.

Other supervisors also made reference to percentages or other limitations, *vis-a-vis,* the hiring of ex-Kroger employees in explaining to applicants that Respondent wanted to avoid certain union considerations. Thus former Kroger employee Bonnie Flateau testified credibly, that Head Cashier Mary Meacham told her not to be disappointed

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Footnote continued—

ployment with *Kessel. Dickerson* did not know at the time that *Kessel* would be the employer. Still further, it is noted that of the hundreds of applicants interviewed by *Morris,* no one else ascribed to him anything referable to picketing. In these circumstances, I find that *Morris'* inquiry was isolated and did not restrain or coerce or interfere otherwise with *Dickerson* in violation of Section 8(a)(1) of the Act, as alleged.

if she wasn't hired, because Respondent could hire only a limited percentage of Kroger employees to avoid having trouble with the Union. Further, the credited testimony disclosed that Supervisor Denise Henke told applicant James McLaren, another former Kroger employee, that Respondent had filled its quota of Kroger employees and explained that if they had hired more than fifty percent, the Union could get them.

I find that Respondent, by telling applicants in the manner noted above, that they are precluded from employment considerations because a quota or percentage had been established, to avoid dealing with the Union, tends to restrain and discourage union activity. See, *Potter's Drug Enterprises, Inc., d/b/a Potter's Chalet Drug and Potter's Wespark Drug*, 233 NLRB 15, 20 (1977), *enfd.* 99 LRRM 3327 (C.A. 9, 1978). Accordingly, I find that Respondent, by the aforenoted statements, acts and conduct violated Section 8(a)(1) of the Act, as alleged.

(4) Other Statements[32]

Barbara Miley testified without contradiction that, in early July, 1982, Tom Lazar, a Kessel manager, refused to give her a recommendation for a job, stating, "I'm sorry Barb, I'm afraid I'd get into trouble." Miley and Lazar

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32. The General Counsel's offer in evidence of two affidavits of *Michael Gerulski*, on the asserted basis that he was unavailable as a witness, pursuant to Rule 804(a) of the Federal Rules of Evidence was denied at the trial. It was noted, *inter alia*, that no attempt was made to serve *Gerulski* with a subpoena personally. Instead, the General Counsel, in large part, relied on information provided on the telephone by someone purporting to be *Gerulski's* mother, that he had moved to Oklahoma. Under all the circumstances, and for reasons noted more fully on the record, and as the General Counsel, in his brief, has not advanced any other basis for the receipt of the affidavits,

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had previously worked at the same North Saginaw Street store, where the latter was store manager. According to the General Counsel, Lazar refused Miley's request because he had observed her picketing and he didn't want to get into trouble with Al Kessel. I find however, in the absence of any anti-union statements or other unlawful conduct by Lazar, that his reference to "trouble" is too ambiguous and insufficient to support the allegation that he refused to recommend Miley because of her support for the Charging Parties. Accordingly, I shall recommend that this allegation be dismissed.

Former Kroger employees Rebecca Green and Meardies Perry ascribed union hostility and certain coercive statements to Richard Knight, a co-manager for Respondent in late October and early December, 1982, which the latter denied. Green and Knight had worked for Kroger in the same Belsay Road store for four years. On the October date in question, Green, while on a picketing break, met with Knight, and had a brief conversation. Green testified that Knight told her that he had "bitter feelings against the Union because we weren't allowed to vote on wage concessions." She asserted that Knight also made reference to the NLRB charges and stated that "if the judge ruled against Kessel that the big man (Al Kessel) himself would close the stores." According to Green, she asked Knight why Kessel would

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Footnote continued—

I reaffirm my previous ruling and find that reasonable efforts were not made to secure *Gerulski's* appearance to warrant the admission of said affidavits. See, generally, ALJ discussion, *K & K Transportation Corp., Inc.*, 254 NLRB 722, 733-734 (1981); *Great Southern Construction, Inc.*, 266 NLRB 364, 376-377 (1983). As no other evidence was submitted with regard to allegations 14(c) and (e) in the amended complaint in Case No. 7-CA-21402 (G.C. Exh. C-1(z)), I shall recommend that said allegations be dismissed.

do something like that and he responded, "Well, Mr. Kessel doesn't want a union and frankly, neither do I."

As for the mid-November allegation, Perry testified that while she was walking the picket line, she met Knight, her "good friend" and former colleague at Kroger's and asked for his help in getting her a job. Perry testified with corroboration from Green that Knight pointed to her picket sign and gave that as his reason for not being able to get her hired.

While Knight admitted conversing with Green and Perry, long time colleagues and friends, he denied the essence of their remarks ascribed to him, relative to the Union. I credit Knight's denials. In doing so, I found him more consistent, plausible, responsive and forthright than Green and Perry. Green, for example, had testified that Knight told her that he had applied for a job with Respondent because, *inter alia*, Kessel had informed him that the Flint store would be non-union. However, in the affidavit provided by Green to the NLRB in November, less than a month after the disputed remarks were made, she stated that she did not know how Knight had learned that the store would be non-union. Perry's testimony also suffered on cross-examination. For example, she testified that during her interview with Kessel, the latter had scribbled some mark, she believed to be an "X" in the upper right hand corner of her application. However, when she later identified her application, she admitted that nothing resembling such a mark appeared thereon. In this connection I found Perry less than candid when she asserted that she had not heard anything about 'X' marks before she had testified, particularly where, as here, so much of the earlier testimony was devoted to this subject.

In crediting Knight, I find, *inter alia,* contrary to the General Counsel, that while he was an active member of the Save Our Jobs Committee (SOJC), such participation, without more, does not reflect an anti-union bias. It appears that SOJC was merely a vehicle to exert pressure on the local union to accept wage concessions from Kroger, to keep the stores open. The record is devoid of any evidence tending to show that SOJC was anti-union.

In sum, I shall recommend that the allegations naming Richard Knight be dismissed, as not supported by credited testimony.

3. Section 8(a)(3) Allegations

A. 7-CA-20284

As noted previously, central to a viable retail grocery operation, as perceived by Al Kessel, was that he be free of union or "successor" obligations, at least in establishing the initial terms and conditions of employment. Thus, Kessel conceded that if he were unable to set the initial wage and benefit package and had to bargain with the Union, he would not have acquired those Kroger stores.

Admittedly, Kessel had long been schooled about "successorship" criteria. In this regard, the record disclosed, *inter alia,* that in 1980, Kessel, as a Hamady official, had received, pursuant to his request, a written opinion from Howard Grossman, Hamady's labor counsel, cautioning him that "if the majority of [Kroger] employees you were to hire were former union employees, the National Labor Relations Board would impose a duty upon [Hamady] to recognize and bargain with the Union."

(G.C. Exh. 9). Grossman also reminded Kessel that Hamady "would not have to adhere to the previous contract." (*Id*). Kessel, in turn, advised President Dandy and other Hamady officials, that neither the Kroger-union contracts nor the existing Hamady-union contacts imposed "successorship" obligations and recommended that these stores open non-union. To accomplish this, Kessel pointed out to Norman Griffin, then Hamady's personnel manager, that they had to hire less than 50 percent of Kroger's workforce in these stores.

While Kessel's recommendations *vis-a-vis* the Union were subsequently rejected, this backdrop is relevant in assessing Kessel's overall *modus operandi*. Again, in 1981 while Hamady officials were assessing the feasibility of acquiring additional Kroger stores, Kessel's posture remained unchanged in terms of dealing with the Union. As the record disclosed, these stores were not acquired by Hamady but by Kessel himself and he was already disposed to operate them non-union. Given his freedom from Hamady constraints, Kessel made plans to discriminate against Kroger employees as alleged.

Thus, the record disclosed that even before the Saginaw/Corunna stores were purchased, Kessel had conveyed to Morris, his intentions to operate these stores non-union and Morris, admittedly, passed this on to Huffman. The credited testimony disclosed that first Morris and later Kessel himself told Huffman that they had to limit the number of Kroger employees to be hired to under fifty percent to reduce the Union's chances to become the bargaining agent. Similarly, the record disclosed that during the evening of November 27, at the Holiday Inn, after a buffet dinner welcoming Kessel's new supervisors, Kessel made it clear that he didn't

want to deal with the Union and cautioned his managerial staff to stay under fifty percent of the Kroger workforce. This theme was repeated over the next two weeks as Kessel closely monitored the hiring of ex-Kroger employees. A number of ex-Kroger employees testified credibly (some without contradiction), that they were told by supervisors that Kessel had set a quota or percentage with respect to the hiring of the Kroger workforce, because he wanted the stores to operate non-union. As noted previously, such statements are coercive and violative of Section 8(a)(1) of the Act.

The record also disclosed that Kessel vented special hostility toward the Meatcutters Union and Richard Phillips, its president. This evolved from difficulties that Kessel, as a Hamady official, had experienced in negotiating with Phillips. Attorney Grossman testified that at the time Kessel (on behalf of Hamady), was involved in negotiating the purchase of Kroger stores in western Michigan, Phillips had refused to give certain contractual commitments which threatened the entire deal. This was not to be soon forgotten by Kessel. As Huffman credibly testified, Kessel called Phillips, a son-of-a-bitch and stated, *inter alia*, "under no circumstances" should he hire anyone from that union. It is undisputed that Kessel did not hire any Kroger meat department employees from the Saginaw/Corunna stores although the meat departments under Kessel, when those stores reopened were admittedly short on experience. In this regard the record disclosed that while four ex-Kroger employees applied for some twenty openings, none of them were hired. Given my earlier credibility resolutions, I am unpersuaded that Respondent made any genuine effort to reach any of these applicants. For example, I see no reason to accept Kessel's assertion, in the absence

of verification, that he phoned applicant Robert Shaler but no one answered.

It is well settled that a new owner, free of successor obligations, is entitled to wipe the slate clean by not hiring or retaining any of the seller's employees. See, *Howard Johnson Co., Inc., supra,* at 262; *Spencer Foods Inc.,* 268 NLRB No. 231, sl. op. at p. 8 (1984); *Jim's Big M,* 264 NLRB 1124 (1982). However, this principle is not so broad as to permit discriminatory hiring practices based on anti-union considerations. Cf. *Jim's Big M, supra,* n. 2. Thus, the Supreme Court in *Howard Johnson,* at 262, n. 8, noted as follows:

> Of course, it is an unfair labor practice for an employer to discriminate in hiring or retentions of employees on the basis of union membership or activity under Section 8(a)(3) of the National Labor Relations Act. . . Thus, *a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union.* (Emphasis added, citations omitted).

As an employer is generally free to hire a completely new and different work force, proving anti-union motivation is no small task. In the case at hand however, given the credited testimony of Huffman and Wallen (statutory supervisors and agents), the conclusion is inescapable that Respondent was discriminatorily motivated in its hiring practices. As such, and on the total state of this record, I am persuaded and find that the General Counsel has established by a preponderance of the credited evidence that Respondent limited the hiring of former Kroger employees to avoid "successorship" obliga-

tions in violation of Section 8(a)(3) of the Act as alleged.[33] See, *Spencer Foods, Inc., supra.*

B. 7-CA-21402

The General Counsel contends that Respondent had engaged in the same discriminatory hiring practices with respect to the five Flint stores, as it had with regard to the three Saginaw/Corunna stores. In support thereof, the General Counsel argues, *inter alia,* that Kessel Food Markets, Inc. (7-CA-20284, Saginaw/Corunna stores), and Kessel Food Stores, Inc. (7-CA-21402, Flint Stores), constitute a single employer and as such, the record does not provide any basis for distinguishing the two cases with respect to discriminatory conduct. Thus, the General Counsel relies "*primarily* on the evidence in Case No. 7-CA-20284." (Emphasis added).

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33. This finding does not extend to former Kroger employees who were employed in the Saginaw/Corunna stores but did not apply for employment with Respondent. While the General Counsel contended futility (not specifically alleged), he produced only two witnesses who testified regarding Respondent's non-union status, but not that they were denied an opportunity to apply or that they were not hired because of union membership or activities. One of these witnesses, *Timothy Adams,* testified that he did not apply because the wages and benefits of a non-union employer were too low. Further, the finding of Section 8(a)(3) violations does not extend to *Greg Ortega, Susan Tahash* and *Ricky Wisner. Ortega* and *Tahash* were not recommended on the basis of performance by supervisors who had worked with them previously. With regard to *Wisner, Huffman* testified that he would not have hired him for reasons unrelated to the Union. On the other hand, it does extend to other members of the *Ortega* family. Thus, I reject as pretextual and not supported by the record, *Kessel's* assigned reason of a policy to reject other members of a family where one member is denied employment. It is noted that none of the supervisors directly involved in hiring testified about any such policy. Moreover, Manager *Tom Sawyer* testified that he was never told of this policy, was instructed by *Kessel* to offer *Bruce Ketcham* part-time work but not his brother, *Tom Ketcham.*

While I am of course mindful of my findings of Respondent's discriminatory hiring practices *vis-a-vis, Saginaw/Corunna,* it is also noted, that there was approximately a five month hiatus before Respondent had acquired and staffed the Flint stores. During the intervening months, Respondent's earlier hiring practices had become the subject of unfair labor practice charges dated February 3, 1982 (G.C. Exh. 1(e)), and a formal complaint dated March 16, 1982 (G.C. Exh. 1(m)). Thus, Kessel had to be cognizant that his acts and conduct *vis-a-vis* the Flint stores would be closely scrutinized. However, this does not mean, that I must reject all statements and other action undertaken by him as merely self-serving. It only serves to underscore the difficulties herein in ascertaining Kessel's real motives unless his action is accompanied by fresh acts of independent misconduct.

The record disclosed that at a May 16 evaluation session, Kessel told his newly appointed managers that he was not concerned with quotas or percentages and expressed a willingness to hire all former Kroger applicants provided that they were rated at least as "good" employees. While Kessel's statements may have been tempered by the pending unfair labor practice allegations, this does not relieve the General Counsel of showing that Kessel's treatment of ex-Kroger employees, coming some five months after the initial misconduct, continued to be discriminatorily motivated. The record tends to militate against such a finding. For example, with regard to the rating of former Kroger employees, I find it plausible and consonant with legitimate business considerations, for Kessel, as he testified (with corroboration), to rely solely on the opinion and recommendations of his four newly appointed managers, all

of whom had served in the same capacity for Kroger. While, on one hand, it is likely that Kessel was still categorically opposed to dealing with a Union with regard to the initial terms and conditions of employment, on the other hand, given the factors then militating against "successorship", it appears that Kessel had little reason to continue his discriminatory hiring practices.[34] Significantly, based on this evaluation process, of ex-Kroger employees, Kessel hired 79 of the 120 applicants or just over 65 percent. (Resp. Exh. 37). The record also disclosed that offers of employment were made and refused by approximately eight other former Kroger-Flint area employees. In all, approximately 72 percent of the former Kroger-Flint employees who applied were either hired or offered employment.

In assessing Kessel's overall motivation *vis-a-vis* the Flint stores, it is also noted, that aside from an isolated reference to a few applicants regarding the non-union status of those stores (previously found herein not to be coercive), the record is devoid of credible evidence tending to show that Respondent otherwise independently violated Section 8(a)(1) of the Act. Thus, unlike the experience of some applicants for jobs at the Saginaw/Corunna stores, no applicant was told that he or she could not be considered for positions for the Flint stores because of a quota or other limitation regarding the hiring of ex-Kroger employees. Further, unlike the *Saginaw/Corunna* situation, where Huffman and Wallen (supervisors and agents) testified against Kessel, no one similarly situated testified adversely to Kessel, with regard to the Flint stores.

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34. For reasons discussed more fully *infra*, I have found Respondent not to be a "successor" as alleged.

In view of the foregoing, noting particularly a five month hiatus and a dearth of evidence tending to show independent misconduct with regard to the Flint stores, I find that the General Counsel has failed to establish by a preponderance of the credible evidence that Respondent continued to discriminate against former Kroger employees as alleged. Accordingly, I shall recommend that the charges alleging violations of Section 8(a)(3) and (1) in Case No. 7-CA-21402 be dismissed.[35]

4. Section 8(a)(4) and (1) Allegations

It is alleged that Respondent suspended and then discharged supervisors Richard Huffman and Bradley Wallen because they gave testimony adverse to Respondent in Case No. 7-CA-20284. Huffman and Wallen testified initially on September 21 and September 23, 1982, respectively.

According to Kessel, he suspended Huffman on September 23, because one day earlier, the latter had assertedly attempted to intimidate Richard Garret, a meat department employee at the Corunna store, by stating, "Don't fuck me or I'll fuck you." Huffman was never questioned about the incident nor reinstated. By letter dated October 14, Kessel advised Huffman that he was terminated effective October 16, without stating any reason for such action. As for Wallen, Kessel asserted that

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35. The General Counsel also contended that Respondent independently violated Section 8(a)(3) of the Act by failing to offer and hire *Meardies Perry* because of her picketing and related activities on behalf of the Charging Parties. For reasons stated previously, I have rejected *Perry's* testimony in critical areas. In the absence of other credible evidence, I find that the General Counsel has failed to demonstrate that Respondent had discriminated against *Perry* as alleged. Accordingly, I shall recommend that this allegation be dismissed.

he was suspended on September 23 because of testimony linking him to a bribe and because of his friendship to Huffman. Wallen also received a termination letter from Kessel dated October 14 without stating any reason for the discharge.

As noted previously, Respondent contends that Huffman and Wallen were discharged because of "repeated acts of disloyalty" which Kessel did not learn about until after they were suspended. I am convinced however, that there was only one act of "disloyalty" that really mattered to Kessel, to wit, the adverse testimony, and that Respondent merely seized upon the other so-called "acts" as a pretext to shield its real motivation.

The factors noted below tending to show that Kessel had decided to retaliate at the first opportunity are telling and substantial. Thus, admittedly, Kessel's immediate reaction to hearing Huffman's testimony in the courtroom was to fire him. Kessel however, was too astute to act so precipitously and backed off, "after [he] had a chance to reflect on it." He explained more fully as follows:

> *"I realized that if I fired him I would make a martyr out of him. . . .* And I realized that I wasn't afraid of the truth and that, if I fired him, it would be a demonstration to the employees that I was hiding something. And I had nothing to hide.
>
> And I figured that if he had the brass to sit here and lie all day, I had the brass to put him back there and make him face the people he was lying about. And that was even better in my mind than firing him." (Emphasis mine).

Kessel's exercise at restraint and his reluctance to "make a martyr" out of Huffman was indeed brief. Two days later, Huffman was suspended. The evening of the day on which Huffman testified, Kessel summoned the Corunna store's supervisors to a meeting to tell them of their colleague's betrayal. He informed his supervisors that Huffman had been a witness for the Union and that his testimony reflected "inaccurate recall." Kessel spoke of the need to build a "business on relationships" and as such, "it requires a great deal of trust." He told his supervisors that he still trusted them; that he didn't know why Huffman did what he did, but, would appreciate "any insight" they might provide and urged them to feel free to come forward with information about Huffman.

To Bonnie Issac, head cashier, and her fellow department heads, Kessel's remarks conceyed the perception that Huffman had "sold them out." Issac explained, "We just thought how could our manager (Huffman) that we had trusted go out and [say] a bunch of things that we didn't think were true and we knew weren't true. I mean, you know, your manager you trust." When Issac was asked how she knew that Huffman was not truthful, she responded, "Well because he was on the union's side, he wasn't on the Kessel side." Thus, Kessel successfully isolated Huffman from the rest of his staff. He could now expect help from his supervisors to supply negatives about Huffman to build a case to justify his dismissal.

The next morning, Respondent began to enlist the support of rank and file employees. Employee Richard Garrett testified that Roy Brody approached him in the meat department that morning at around 8:00 a.m., and spoke of the "shock" of Huffman's testimony. Brody urged Garrett to come forward and volunteer "any kind

of information" about Huffman. According to Brody, Garrett responded immediately, but the former did not pursue the matter until after he left the store and had a chance to reflect thereon. Brody later phoned Garrett at the store, and arrangements were made to meet after work.

Early the same morning, and soon after Garrett first met with Brody, Huffman engaged Garrett in a brief discussion in the meat department. Huffman had learned of Kessel's meeting the previous evening and to dispel the notion that he had "sold out", he told Garrett that he testified truthfully. To break some of the tension surrounding the trial, Huffman also remarked in a joking manner, "Besides, don't you guys fuck with me because otherwise I am going to fuck with you." According to Kessel, this latter remark, which he first learned about that evening, constituted an attempt by Huffman to intimidate Garrett and as such, decided to suspend Huffman the following day.

Clearly, without more, Huffman's remark, at best, is ambiguous. However, it doesn't matter, if, as I am convinced, that Kessel was looking for any vehicle, even if only colorable, to rid himself of Huffman. Thus, admittedly, no attempt was made by Respondent to question Huffman regarding the incident. Garrett's recent employment history does not tend to qualify him as a model for trustworthiness. Thus the record disclosed that Garrett's previous employer had accused him of theft of meat and had threatened to have him prosecuted, dropping the matter only after Garrett signed a statement stating that he would not attempt to return to work and collect back wages. More recently, Tim Kessel also accused him of theft, although here, it appears that Respondent cleared him of wrongdoing about one week before Huffman testified.

In the total circumstances of this case, noting, *inter alia,* Garrett's apparent willingness to "volunteer" information about Huffman and Wallen, both before and after Huffman's remarks, I find it highly unlikely that he was intimidated. Rather, I find it more likely that Garrett seized upon Huffman's remarks to further secure his own position with Respondent. In any event, the failure to undertake any meaningful investigation and to rely solely on Garrett[36] tends to support the view that Respondent was not really interested in the facts but out to get Huffman.

As noted above, on the evening of September 23 (Wallen had testified earlier that morning), Kessel without giving any reason, told Huffman and Wallen that they were suspended with pay. The suspensions were never lifted; both of them were terminated effective October 16. In the meantime, Kessel's efforts to build a case by urging his employees to come forward with any information produced a stream of reports touching on virtually everything that Huffman and Wallen did both inside and outside the store. Sharon Edwards, head baker, for example, met with Kessel on three separate occasions to ensure that nothing of possible use against Huffman and Wallen was omitted. With regard to Wallen, she even "speculated" that he was responsible for stealing meat in his department although Kessel acknowledged that this was never substantiated.[37] The result is a smorgasboard of com-

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36. As a witness, I found *Garrett,* vague, evasive, inconsistent and unreliable.

37. In assessing whether any of the information provided by *Edwards* was accurate on one hand, or exaggerated or based on hearsay on the other, it is noted, *inter alia,* that she and *Issac* compared mental notes about *Huffman,* before much of it was related to *Kessel.* I tend to believe the latter condition

(Continued on following page)

plaints, much of which is petty, ambiguous, based on hearsay, speculative, conclusionary and unsubstantiated.[38]

Moreover, the information, in major part was derived from those with self-interest, anti-union bias or from those who were otherwise out to get Huffman and Wallen for testifying against Kessel.[39]

Footnote continued—

because I found *Edwards*, at times, evasive, inconsistent, less than forthright and along wtih my observation of her demeanor, unimpressive as a witness. As for being less than forthright, it is noted, *inter alia*, that *Edwards* said nothing of an important private meeting she had with *Kessel*, at the home of a colleague on the subject of *Huffman*.

38. For example, *Edwards* and *Issac* had informed *Kessel* of various doubts expressed by *Huffman* regarding the future of Respondent's operations, e.g., that it might not be in business "for much more than a year." *Edwards* acknowledged that *Huffman* did not explain nor did she ask him what he meant. *Issac* testified that she asked *Huffman* if she should start looking for another job to which *Huffman* "kind of smirked and didn't say much more." *Kessel* seized upon this as an example of *Huffman's* disloyalty and efforts to undermine Respondent. I find that the credited testimony does not support *Kessel's* contention. Thus, in the absence of evidence to the contrary, the assessment ascribed to *Huffman* may have represented his frank opinion at that time. Further, I see no reason, without more, to attribute any sinister motive to Huffman. In any event, the remarks and circumstances, at most, are ambiguous. On the other hand, I find the failure by *Kessel* to question *Huffman* with regard to the remarks ascribed to him tends to support the finding that the various reasons assigned by *Kessel* for terminating him are merely pretextual.

39. As noted eariler, according to *Issac*, *Huffman* had to be lying because he was on the Union side. *Orville Yerian*, the grocery manager, during his employment interview noted that the "union contract" was an impediment to a successful grocery business operation. He cited examples dealing with seniority and scheduling as limiting an employer's ability to operate the business. While *Yerian's* anti-union sentiments is a factor to consider in assessing his overall credibility, it is also noted that he was independently upset at *Huffman* because the latter made reference to him in his testimony. Overall, including demeanor factors, I found *Yerian* largely implausible, evasive, equivocal, less than forthright and unreliable as a witness.

Respondent relies, in large part, on statements Huffman was asserted to have made denigrating both Brody and Kessel in April and May. For example, Issac told Kessel that Huffman told her in late April or early May that he used to work with Brody (at Hamady's), and cautioned her to "watch out" because "he can be a creep." Assuming *arguendo*, that the statement was made, it does not appear so outrageous, or that it otherwise reaches the level of materially compromising Brody's position to normally warrant dismissal. Further, aside from the fact that the statement, if made, occurred four or five months before Huffman testified, the record disclosed that by the time the instant hearing opened, the relationship between Brody and Huffman, after some early problems, had improved steadily. As noted by Brody, while he had threatened to replace Huffman in July, by mid-August he was doing "much better" and by the time Huffman testified, conditions in the Corunna store were "fine" and on "par" with the other stores.

Given the total circumstances of this case, noting, *inter alia*, that Huffman was performing, at least satisfactorily, at the time the instant hearing opened, the conclusion is inescapable and I find that but for the fact that he testified adversely to Respondent, he would not have been suspended and/or discharged. As discussed previously, I have also considered and rejected the plethora of reasons assigned by Respondent for its action as pretextual. Compare, *Datagraphic, Inc.*, 259 NLRB 1285, n.2 (1982); *Gerry's Cash Markets Inc., d/b/a Gerry's I.G.A.*, 238 NLRB 1144-1145, 1151 (1978).

Similarly, I find the various reasons assigned by Respondent for suspending and discharging Wallen are pretextual. Kessel noted, *inter alia*, that he discharged Wallen

because he was planning on leaving the company without notice and lied about such intentions when he testified. As discussed more fully previously, (see "Credibility", *supra*), the record disclosed that while Wallen had explored job opportunities with the Taco Bell Corporation, he had not been offered a job, and in fact, appeared to have lost interest by not showing up for interviews. In this context, Wallen's representation that he was not looking for another job at the time he testified, without more, appeared to be confirmed by the record.

Kessel also noted the testimony linking Wallen to a bribe and speculation connecting him with the missing meat at the store. For reasons stated previously (see "Credibility", *supra*), I discredited all such testimony linking Wallen to a bribe and noted a dearth of probative evidence otherwise tending to support Respondent's bribery charges. As for Wallen confiscating meat for his own use, Kessel himself acknowledged that Edwards' speculation regarding this matter had not been substantiated.

It is beyond dispute that the discharge of supervisors for giving testimony adverse to their employer's interest is unlawful. See, *Parker-Robb Chevrolet*, 262 NLRB 402, 404 (1982); *Orkin Exterminating Co. Inc.*, 270 NLRB No. 75 (1984). As such, and on the basis of the entire record, I find that Respondent suspended and later discharged Huffman and Wallen because they provided adverse testimony, thereby violating Section 8(a)(1) of the Act.[40]

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40. Given this finding, I find it unnecessary to determine whether Respondent's conduct also violated Section 8(a)(4). See, *Orkin Exterminating Co., Inc., supra*, n. 5.

5. Section 8(a)(5) and (1) Allegations Successorship

The record disclosed that on November 14, 1981, Kroger closed three stores in Michigan: two in Saginaw, and a third in Corunna, all within approximately a sixty mile radius. Respondent purchased all three stores a few days later, opening the Saginaw stores on December 2, 1981, and the Corunna store, the following week. On December 24, 1981, Kroger closed an additional five stores in Michigan, all located in the nearby Flint area. On April 30, 1982, Respondent also purchased the five Kroger Flint stores, opening all of them on May 23, 1982. As noted previously, although Respondent incorporated the Saginaw/Corunna stores and the Flint stores separately, all of them are known as Kessel stores and the two entities (Kessel Food Markets Inc., and Kessel Food Stores, Inc.) constitute a single employer relationship within the meaning of the Act.

The General Counsel contends that Respondent is a "successor" to Kroger in the overall eight store unit, and as such, it succeeded to Kroger's obligations to recognize and bargain with the Charging Unions. Respondent denies that it is a "successor," noting principally, that the Charging Unions had not, at any time material herein, represented a majority of its employees, in any appropriate unit.[41]

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41. The General Counsel first alleged in Case No. 7-CA-20284, basically, that all hourly employees, with the traditional exclusions employed by Kessel Food Markets, Inc., in its three stores located in the Saginaw/Corunna area, constituted the appropriate unit. This unit was subsequently enlarged in Case No. 7-CA-21402 to also include all hourly employees employed by Kessel Food Stores, Inc., in the five Flint area stores. It

(Continued on following page)

For a new employer to be deemed a successor for collective bargaining purposes, it must first be determined "whether there is substantial continuity of the business enterprise." *Spencer Foods, supra,* at p. 6, citing, *N.L.R.B. v. Burns Security Services,* 406 U.S. 272, 80 LRRM 2225 (1972). To reach this threshold question, the Board assesses such factors as follows: (1) whether there has been a substantial continuity of the same operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he used the same machinery, equipment and methods of production; and (7) whether he manufactures the same product or offers the same services. *Georgetown Stainless Mfg. Corp.,* 198 NLRB 234, 236 (1972); *Border Steel Rolling Mills, Inc.,* 204 NLRB 814, 821 (1973).

In applying the above factors to the instant case, it is noted that there is considerable evidence tending to both support and militate against a finding of successorship.

Footnote continued—

was also alleged, and I have previously found, that the two enterprises constitute a single employer relationship. (See, n. 4 *supra*). As such, I find no legally sufficient basis to support Respondent's contention, that the matter was time-barred by Section 10(b) of the Act. See, generally *Clinch Valley Clinic Hospital,* 213 NLRB 315 (1974); *Amshu Associates, Inc.,* 234 NLRB 791, n. 2 (1978). Many of the same factors supporting the single employer relationship also serve to favor an overall unit. Thus, the record disclosed, *inter alia,* heavy centralization with regard to clerical, and administrative functions, one overall labor relations policy including common wages and benefits and other terms and conditions of employment, and common overall supervision and employee transfers. Noting also that each store exercises little or no autonomy, I find that all eight stores are sufficiently integrated thereby justifying the appropriateness of the overall unit, as alleged.

In support of successorship, the record disclosed that Respondent has continued in the retail grocery business, in the same stores and in some respects, operated in the same manner as Kroger. Additionally, Respondent purchased equipment, fixtures, merchandise, inventories, supplies and assumed Kroger's leases. Further, Kroger, contractually agreed to supply Respondent, *inter alia*, grocery, perishable frozen food, produce, dairy and meat items and to assist at least initially, in training Respondent's personnel. (Resp. Exh. 3, p.1 and Service Agreement, numbered para. 2; Jt. Exh. 5).

Kroger's presence, at least in part, was also reflected in the composition of Respondent's initial work force. As stated by Kessel, "We were going to buy from Kroger. We needed people who understood the Kroger system." While the record disclosed that well under half of Kroger's rank-and-file employees were hired by Respondent, a slight majority of its initial supervisory employees (31 out of 60) were previously employed by Kroger in these stores. Kessel also gave some preference to applicants with Kroger experience in filling its limited number of full-time positions.

Still further, the record disclosed that Respondent reached out for the same customer pool which had been serviced by Kroger. Kessel explained that he knew from his long experience in the retail supermarket industry, that the longer the stores remained closed, the greater the likelihood that customers all form new habits and shop elsewhere. Thus, Kessel wasted little time in acquiring a work force and making other arrangements to reopen the stores as soon as possible.

On the other hand, the record disclosed significant differences in the two operations which tend to militate

against any finding of successorship. A major difference is the increased size and composition of Respondent's work force. Thus, the record disclosed that Kroger employed 174 unit employees at the time the Saginaw/Corunna stores closed and 323 unit employees at the time the Flint stores closed for a total of 497. Kroger's full-time employees far outnumbered the part-timers on a 3 to 1 ratio. (G.C. Exh's 8 and 14). By comparison, Kessel employed 216 unit employees at the time the Saginaw/Corunna stores reopened in early December, 1981, and 395 unit employees in the Flint stores in May, 1982, when those stores reopened for a combined total of 611. Kessel however, for reasons noted below, reversed the 3 to 1 ratio, by favoring part-timers over full-time employees. (Resp. Exh's 10 and 25(a)-(e)).

Kessel's stated formula for success was to maintain a high service, low price operation. He wanted his customers serviced quickly, in and out of the store, and likened it to a "Burger King" fast food operation. Thus, he planned to flood the front end of the store with personnel such as cashiers, assistant cashiers and courtesy clerks, (baggers) To accomplish this on a cost efficient basis, he increased the size of the work force appreciably with emphasis on part-time help and as a concomitant thereof, lower wages and benefits. While I have found that Respondent, to avoid successor obligations, limited the number of former Kroger employees it hired in the Saginaw/Corunna stores, it is not alleged, nor can I find, on the state of this record that Kessel's reliance on part-time help was unlawfully inspired rather than predicated on legitimate business considerations.

As the vast majority of Respondent's work force was comprised of part-time employees (unlike the Kroger sit-

uation) and as it is undisputed that its unit employees, generally, received substantially less in wages and benefits than Kroger employees (G.C.'s Brief, p. 42), clearly these differences regarding terms and conditions of employment are also factors tending to detract from the "continuity of the business enterprise." Of greater significance however, is assuming *arguendo*, all of the ex-Kroger employees employed in the eight stores who had applied were hired, this number would still fall far short of comprising a majority of Respondent's work force at the time the stores reopened or at any other material time herein.[42] Thus, the record disclosed that of approximately 500 unit employees employed by Kroger in its eight stores immediately before those stores closed, only approximately 170 of them applied for some 611 unit positions (86 were hired) before those stores reopened. (Jt. Exh's 2 and 3; G.C. Exh. 14; Resp. Exh. 37). As such, Kroger's unit employees constituted only approximately 14.5 percent of Respondent's eight store rank-and-file work force (86 out of 611). The only demand herein for recognition and bargaining was untimely made in November, 1981, before any of the stores had opened and only supervisors and a few rank-and-file employees had been hired. Compare, *Harbor Cartage, Inc.*, 269 NLRB No. 152, sl. op. p. 5 (1984), where the Union's demand was made at a time when the Respondent had "essentially completed" its hiring complement, a majority of whom had worked for the predecessor.

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42. The General Counsel's reference to an occasional Board decision where a majority showing in the context of "outrageous and pervasive" conduct during organizing campaigns was unnecessary, as a precondition to warrant a bargaining order, is now dated. See *Gourmet Foods, Inc.*, 270 NLRB No. 113, sl. op. p. 7 (1984), where the Board declared, "(W)e would, under no circumstances, issue a non-majority bargaining order."

As noted previously, it is not expressly alleged, nor does the record disclose that any significant number of ex-Kroger employees were denied an opportunity to apply or that they did not apply because they believed it to be futile. (See n. 33 *supra*). Thus, unlike the record giving rise to a "successor" finding in *Karl Kallman d/b/a Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), *enf'd in pertinent part*, 640 F.2d 1049 (C.A. 9, 1981), heavily relied on by the General Counsel, it has *not* been demonstrated herein, that "but for" Respondent's unlawful conduct, the Charging Unions would have "survived" as the exclusive majority bargaining representatives for their respective units.

Further, in the instant case, unlike *Kallman*, where the Board had determined that Respondent's "unusual" hiring procedure was designed to conceal from its predecessor's employees the fact that it was hiring, I find herein that Respondent's reasons for failing to identify itself in its initial advertisements and its decision to open employment opportunities to the public at large, rather than to confine itself to Kroger's work force are plausible and appear to be based on sound business considerations. For example, it is understandable, as explained by Kessel, that he initially used "blind" advertisements to minimize his risk of embarrassment in the eyes of those involved in the grocery supermarket industry because he had not yet purchased the Kroger stores. However, Kessel had to advertise immediately as Thanksgiving and Christmas were approaching, and he wanted to acquire a work force in time to open the stores for the holidays.

As for opening up employment opportunities to the public at large rather than acquiring the same work force employed by Kroger in those Saginaw, Corunna and Flint

area stores, Kessel explained that this latter source for labor was far too limited to satisfy his prescription for a successful operation in the retail supermarket industry. As noted above, Kessel required a much larger staff than Kroger with special reliance on part-timers who were to receive lower wages and benefits. According to Kessel, in such circumstances, he could not be confident that Kroger's staff, comprised mostly of full-time employees would be attracted or interested in working for Respondent. Without more contrary to the General Counsel, I cannot find in the circumstances of this case, that Kessel by advertising for personnel in the newspapers did so, in whole or in part, to "conceal" for discriminatory reasons, the identity of the new employer from Kroger employees.

Still other factors tending to militate against "successorship" involve the hiatus in operations and the Union disaffection expressed by a majority of Kroger employees.

The record disclosed that the three Saginaw/Corunna stores were closed over approximately a three to five week period and the five Flint area stores for approximately five months before these facilities reopened as Respondent's stores. Kroger had determined that it was financially too costly to continue to operate these facilities without concessions from the Charging Unions and none were forthcoming. Thus, it appears that Kroger no longer deemed in viable to maintain those stores and closed all of them, while actively pursuing a purchaser. Huffman credibly testified with corroboration and without any contradiction that during the employment interviews a majority of Kroger employees stated that they were "bitter and angry" toward the Union for not permitting them to be heard, *vis-a-vis*, the concessions. They also held Charging Unions largely responsible for the demise of the stores.

These circumstances give rise to a substantial question regarding the Charging Union's continued support among Kroger employees at the stores in question. Cf. *United Maintenance & Manufacturing Co.*, 214 NLRB 529, 532 (1974), where, *inter alia,* the hiatus resulted from the employees' strike.

Given the totality of the circumstances noting the factors stated previously favoring successorship but also noting, *inter alia,* that Respondent employed a substantially larger complement of employees; that most of its employees were part-time employees, that there were substantial differences in other terms and conditions of employment; that there existed a substantial hiatus in operations; that a majority of ex-Kroger employee-applicants expressed union disaffection, and that the Charging Unions had not represented a majority of Respondent's employees at any time material herein, I am persuaded that on balance, the record falls short of establishing a sufficient continuity of the business enterprise. In short, I find that Respondent does not qualify as a successor for collective bargaining purposes. See, generally, *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board, supra,* at 262-263, n. 9. *A fortiori,* all allegations derived therefrom must fall. Accordingly, I shall recommend that all Section 8(a)(5) allegations be dismissed.

Conclusions of Law

1. Respondent Kessel Food Markets, Inc. and Respondent Kessel Food Stores, Inc. (collectively also Respondent), constitute a single employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Locals 876 and 539, United Food and Commercial Workers International Union, AFL-CIO-CLC (Charging Unions), are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent is not a successor to The Kroger Company ("Kroger") and its refusal to recognize and bargain with the Charging Unions has not violated Section 8(a)(5) and (1) of the Act.

4. By telling job applicants that they could not be hired because it was limited in hiring to a quota or a percentage of less than one half of the former Kroger employees who were employed in the Saginaw/Corunna stores, in order to remain non-union, Respondent violated Section 8(a)(1) of the Act.

5. By suspending and then discharging supervisors Richard Huffman and Bradley Wallen because they gave testimony at a Board proceeding, the Respondent, has interfered with, restrained, or coerced nonsupervisory employees in the free exercise of their statutory rights guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

6. By establishing discriminatory hiring practices which limited the hiring of former Kroger employees who were employed in the Saginaw/Corunna stores to under fifty percent to avoid dealing with the Charging Unions for collective bargaining purposes, Respondent violated Section 8(a)(3) and (1) of the Act.

7. Except to the extent set forth in conclusions of law 4 through 6 above, the Respondent has not otherwise committed unfair labor practices as alleged in these consolidated cases.

8. The unfair labor practices noted in conclusions of law 4 through 6 above, are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent's hiring practices had discriminated against applicants who had been employed by Kroger in the Saginaw/Corunna stores in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it offer all such individuals who would have been hired employment in the positions for which they would have been hired but for the Respondent's unlawful discrimination or, if those positions no longer exist, to substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such positions.[43] See, *Spencer Foods, Inc.*, 268 NLRB No. 231, sl. op. p. 13 (1984). I shall also recommend that Respondent make whole for any losses they may suffered all individuals it would have hired but for its unlawful discrimination against them, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel*

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43. For reasons stated previously, the remedy does not extend to former Kroger employees who had not applied for employment. See n. 33, *supra*.

Corp., 231 NLRB 651 (1977). See generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Having also found that Respondent's suspensions and subsequent discharges of supervisors Richard Huffman and Bradley Wallen interfered with, restrained and coerced nonsupervisory employees in the exercise of their statutory rights thereby violating Section 8(a)(1) of the Act, I shall recommend that Respondent offer Huffman and Wallen immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of Respondent's unlawful action. See, *Oil City Brass Works*, 147 NLRB 627, 631 (1964), enfd. 357 F.2d 466 (C.A. 5, 1966). Backpay, with interest, shall be computed in accordance with the formula set forth in the Board cases cited hereinabove. See also *Orkin Exterminating Co. Inc.*, 270 NLRB No. 75 (1984).

Still further, to cure the independent Section 8(a)(1) violations, I shall recommend that Respondent cease and desist with the narrow "in any like or related" injunctive language. See *Spencer Foods, Inc., supra*, at p. 14.

On the basis of the above findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[44]

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44. In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

A. The Respondent, Kessel Food Markets, Inc. and Kessel Food Stores, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Establishing discriminatory hiring practices to limit the hiring of applicants who were formerly employed by The Kroger Company ("Kroger") in its Saginaw and Corunna stores to avoid dealing with Locals 876 and 539, United Food and Commercial Workers International Union, AFL-CIO-CLC (Charging Unions), for collective bargaining purposes.

(b) Interfering with, restraining, or coercing nonsupervisory employees in the exercise of their statutory rights by suspending and discharging supervisory personnel because they had given testimony under the Act.

(c) Telling job applicants that they could not be hired because it was limited to a quota or a percentage of less than one half of the Kroger work force employed in the Saginaw/Corunna stores in order to remain nonunion.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to all individuals who would have been hired employment in the positions for which they would have been hired but for Respondent's unlawful discrimination or, if those positions no longer exist, to substan-

tially equivalent positions dismissing, if necessary, any and all persons hired to fill such positions.

(b) Make whole in the manner set forth in the section above entitled "The Remedy" those individuals the Respondent would have hired but for its unlawful discrimination for any losses they may have suffered by reason of the Respondent's failure to hire them.

(c) Offer Richard Huffman and Bradley Wallen immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole in the manner set forth above in the section entitled "The Remedy".

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Sign and post at its stores in Saginaw and Corunna, Michigan, copies of the attached notice marked "Appendix."[45] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places

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45. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 19, 1984

/s/ Irwin Kaplan
Irwin Kaplan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT establish discriminatory hiring practices to limit the hiring of applicants who were formerly employed by the Kroger Company ("Kroger") in its Saginaw and Corunna stores to avoid dealing with Locals 876 and 539, United Food and Commercial Workers International Union, AFL-CIO-CLC ("Unions"), for collective bargaining purposes.

WE WILL NOT interfere with, restrain, or coerce non-supervisory employees in the exercise of their rights by suspending and discharging supervisory personnel because they had given testimony under the Act.

WE WILL NOT tell job applicants that they could not be hired because we are limited to a quota or a percentage of less than one half of the Kroger work force employed in the Saginaw and Corunna stores in order to remain non-union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to all individuals who would have been hired employment in the positions for which they would

have been hired but for our unlawful discrimination or, if such jobs no longer exist, to substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such position. WE WILL make whole with interest all individuals we would have hired but for our unlawful discrimination for any loss they may have suffered by reason of our failure to hire them.

WE WILL offer RICHARD HUFFMAN and BRADLEY WALLEN full and immediate reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges, and make them whole for any loss of pay suffered as a result of their discharges.

KESSEL FOOD MARKETS, INC. and
KESSEL FOOD STORES, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. Patrick V. McNamara Federal Building, 477 Michigan Avenue - Room 300, Detroit MI 48226, Telephone 313-226-3244.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CIVIL NO.

BERNARD GOTTFRIED, Regional Director of the Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KESSEL FOOD MARKETS, INC.
Respondent

PETITION FOR INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable R. James Harvey, Judge of the United States District Court for the Eastern District of Michigan, Northern Division:

Comes now Bernard Gottfried, Regional Director of the Seventh Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j); herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved pending before the Board on charges alleging, that Respondent has

engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1), (3) and (5), of the Act. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Seventh Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. On or about February 3, 1982, Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC (herein called Charging Party Local 40), pursuant to provisions of the Act, filed a charge with the Board alleging that Kessel Food Markets, Inc., (herein called Respondent) has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of said charge is attached hereto as Exhibit 1 and made a part hereof.

4. The aforesaid charge was referred to Petitioner as Regional Director of the Seventh Region of the Board.

5. Upon the basis of the following, Petitioner has reasonable cause to believe that said charge is true, insofar as it alleges that Respondent has violated Section 8(a)(1), (3) and (5), of the Act, and a complaint of the Board based on said charge has issued against Respondent pursuant to Section 10(b) of the Act. More particularly, Petitioner has reasonable cause to believe, and believes, that Respondent is an employer engaged in commerce within the meaning of Sections 2(2) and 2(6) of the Act, and that Respondent has engaged in and is engaging in acts and conduct in violation of Sections 8(a)(1), (3) and (5) of the Act, affecting com-

merce within the meaning of Section 2(6) and (7) of the Act as follows:

(a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan.

(b) At all times material herein, Respondent has maintained its principal office and place of business at 4414 Bay Rd., in the City of Saginaw, and State of Michigan. Respondent maintains three retail stores at 3430 State Street and 4675 Bay Road, in the City of Saginaw, and 2520 E. Main Street in the City of Corunna, all in the State of Michigan. Respondent is, and has been at all times material herein, engaged in the retail sale of foods, groceries, and related products. All of Respondent's aforementioned facilities are involved in this proceeding.

(c) Based upon a projection of its business operations, since on or about December 2, 1981, at which time Respondent commenced its operations, Respondent, in the course and conduct of its retail operations, will annually derive gross revenues in excess of $500,000.

(d) During the year ending December 31, 1981, which period is representative of its operations during all times material hereto, Respondent, in the course and conduct of its business operations, purchased and caused to be transported and delivered at its three retail stores foods, groceries and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to said retail stores in Saginaw and Corunna, Michigan, and received from other enterprises, including, *inter alia*, The Kroger Company, located in the State of Michigan, each of which other enterprises had received the said goods

and materials delivered to Respondent directly from points located outside of the State of Michigan.

(e) Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) and 10(j) of the Act.

(f) Charging Party Local 40 is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

(g) At all times material herein, the following named persons occupied the positions set opposite their respective names, and have been and are now supervisors of the Respondent, within the meaning of Section 2(11) of the Act, and/or its agents:

Albert Kessel	President
Terry Smith	Store Manager (State Street, Saginaw store)
Rick Huffman	Store Manager (Corunna store)
Larry Schmidt	Store Manager (Bay Rd., Saginaw store)
Bill Miller	Grocery Manager (State Street, Saginaw store)
Denise Henke	Front End Manager (Bay Rd., Saginaw store)
Sam Morris	Consultant (SMC Associates)
Mary Meacham	Head Cashier (State Street, Saginaw Store)
..... Kessel	Position presently unknown to the undersigned, but well known to Respondent; believed to be a son of Albert Kessel, who acted as a Respondent hiring agent.

(h) The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining between Respondent and Charging Party Local 40, within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees, including employees of lessees, licensees and concessionaires employed at Respondent's three retail stores at 3430 State Street and 4675 Bay Road, in the City of Saginaw, and 2520 E. Main Street in the City of Corunna, all in the State of Michigan; but excluding meat department employees, guards and supervisors as defined in the Act.

(i) From on or before 1977 to on or about November 14, 1981, Charging Party Local 40 was the designated exclusive collective bargaining representative within the meaning of Section 9(a) of the Act of a multi-store bargaining unit, then employed by The Kroger Company, which includes the employees in the unit described above in subparagraph 5(h), and was recognized as such representative by The Kroger Company. Such recognition was embodied in successive collective bargaining agreements between The Kroger Company and Charging Party Local 40, the most recent of which is effective by its terms for the period March 23, 1980 through April 2, 1983.

(j)(1) In or about mid-November, 1981 Respondent purchased the three retail stores described in paragraph 5(b), above, from The Kroger Company, including the fixtures, equipment and inventory of said stores, and since that date has been engaged in the same business operations, at the same location, selling the same products and services to substantially the same customers.

(2) But for Respondent's discrimination against employees, described in subparagraph 5(n), and its subparagraphs, *infra*, who were previously employees of The Kroger Company, and represented by Charging Party Local 40 at said three retail stores, Charging Party Local 40 would have, on or after the takeover by Respondent, attained majority status in the said unit of the three stores.

(k) By virtue of the operations described above in subparagraph (5)(j), and its subparagraphs, Respondent has continued as the employing entity and is a successor of The Kroger Company.

(l) At all times since in or before 1977, and continuing to date, Charging Party Local 40, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of the employees in the unit described above in subparagraph 5(h) for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(m) Since on or about late November, 1981, Respondent has interfered with, restrained and coerced employees, and is interfering with, restraining and coercing employees, in the exercise of rights guaranteed in Section 7 of the Act by the acts and conduct set forth below:

(1) On or about late November, 1981, Respondent, by its agents, ... Kessel and Denise Henke, at its Bay Road store, while interviewing employment applicants, told said employees that Respondent was restricting the number of former Kroger Company employees to be hired in order to avoid having to recognize, in part, Charging Party Local 40.

(2) On or about early December, 1981, Respondent, by its agent Rick Huffman, at its Corunna store, told employees seeking employment with Respondent that Respondent could not hire any additional former Kroger Company employees as Respondent feared it was close to approaching hiring a majority of such employees.

(3) On or about early February, 1982, Respondent, by and through its agent Bill Miller, at its State Street store, told employees that Respondent would hire only one-third of the former Kroger employees.

(4) In or about Mid-November, 1981, Respondent, by and through its agent Sam Morris, at the Bay Valley Inn near Saginaw, Michigan, while interviewing employment applicants, coercively interrogated employees by asking if they would be willing to cross picket lines.

(5) In or about mid-November, 1981 Respondent, by and through its agent Sam Morris, at the Bay Valley Inn, near Saginaw, Michigan, while interviewing employment applicants, told employees that the Kessel stores would be non-union.

(6) In or about mid-November, 1981 Respondent, by and through its agent Mary Meacham, at the Kroger retail store on Euclid Avenue in Bay City, Michigan told employees that the Kessel stores would be non-union.

(7) In or about mid-November, 1981 Respondent, by and through its agent Mary Meacham, during a telephone conversation, told employees that Respondent agent Al Kessel would only hire a certain percentage of former Kroger employees so as to forestall

any obligation to recognize, in part, Charging Party Local 40.

(8) In or about mid-November, 1981 Respondent, by and through its agent Al Kessel, at the Bay Valley Inn near Saginaw, Michigan, while interviewing employment applicants, interrogated employees about their union sympathies.

(9) In or about mid-November, 1981 Respondent, by and through its agent Rick Huffman, at the Corunna store, told employees that Respondent agent Al Kessel had instructed him not to hire any more former Kroger employees for the Corunna store because the Respondent was getting too close to 50 percent and that Respondent wanted its stores to be non-union.

(n)(1) Since in or about mid-November 1981 Respondent, by and through its agents Al Kessel, Terry Smith, Rick Huffman, Sam Morris, and Larry Schmidt, has failed and refused to offer employment to *all* employees, who were formerly employed by The Kroger Company at the Bay City and Corunna stores and represented by Charging Party Local 40 when The Kroger Company operated Respondent's three retail stores.

(2) Respondent took the actions set forth above in subparagraph 5(n)(1) because of the employees' membership in Charging Party Local 40 and to avoid having to become a successor of The Kroger Company, and to abort a legal obligation to recognize and bargain with Charging Party Local 40 as the exclusive collective bargaining representatives of its employees.

(o) Since on or about late November, 1981, Respondent has failed and refused to recognize and bargain with Charging Party Local 40, as the exclusive collec-

tive bargaining representative of the employees in the unit described above in subparagraph 5(h).

(p) In or about early December, 1981, Respondent, by and through its agent Al Kessel, unilaterally, without notice to or bargaining with Charging Party Local 40, reduced the wages and benefits, and altered the hours and working conditions of the employees in the unit described in subparagraph 5(h), above, from those set forth in the collective bargaining agreement between The Kroger Company and Charging Party Local 40.

(q) By the acts described above in subparagraphs 5(j)(2), 5(m), 5(n), 5(o) and 5(p), and their respective subparagraphs, and by each of said acts, Respondent did interfere with, restrain, and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7), and 10(j) of the Act.

(r) By the acts described above in subparagraphs 5(j)(2) and 5(m) and its subparagraphs, and by each of said acts, Respondent did discriminate, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7), and 10(j) of the Act.

(s) By the acts described above in subparagraphs 5(j)(2), 5(o) and 5(p), and their subparagraphs, and by each of said acts, Respondent did refuse to bar-

gain collectively and is refusing to bargain collectively with the representative of its employees, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7), and 10(j) of the Act.

(t) The acts of Respondent described in subparagraphs, 5(j)(2), 5(m), 5(n), 5(o) and 5(p), and their subparagraphs, occurring in connection with operations of Respondent described in paragraphs 5(a) through 5(e), above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

(u) The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) (3) and (5) and Section 2(6) and (7), and 10(j) of the Act.

6. Upon information and belief, it may be fairly anticipated that unless the aforesaid unfair labor practices are immediately restrained, a clear and serious flouting of the Act will continue with the result that enforcement of important provisions of the Act and public policy will be thwarted before Respondent can be placed under legal restraint through the regular procedures of a Board Order and a Court of Appeals Decree. Unless injunctive relief is immediately obtained, it may be fairly anticipated that Respondent will continue its unlawful conduct during the proceedings before the Board and during subsequent proceedings before a Court of Appeals, with the ultimate result being that the rights of the employees involved as well as the Charging Parties, are being held in abeyance pending the ultimate outcome of this proceeding. Further, it is submitted that the anticipated Board Order and subsequent Court Decree

may not effectively remedy the violation, in that the natural and foreseeable result during the interim, for however long it lasts, is that Respondent will dissipate support for Charging Party Local 40 at the expense of employees and Charging Party Local 40 and, said employees for an extended period of time will be denied the benefits of Union representation. Equally important, during the lengthy passage of time that it has been and will be the beneficiary of its unlawful acts, Respondent will have demonstrated its powers to ignore employee rights, thereby flagrantly chilling the employees in their rights as set forth and protected by the National Labor Relations Act.

7. Upon information and belief, to avoid the serious consequences referred to above in paragraph 6, it is essential, just, proper and appropriate for the purposes of effectuating the policies of the Act and avoiding substantial, irreparable, and immediate injury to such policies, to the employees of Respondents, to the Charging Party Local 40, and to the public interest, and in accordance with the purposes of Section 10(j) of the Act, that pending final disposition of the matters involved herein, Respondent be directed, enjoined and restrained as herein prayed.

WHEREFORE, Petitioner prays:

That the Court issue an order directing Respondent, to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, their officers, representatives, agents, servants, employees, attorneys and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board.

1. From engaging in the following acts and conduct:

(a) Telling employees that it will not be operating unionized retail stores.

(b) Telling employees that it was restricting the number of former Kroger Company employees to be hired in order to avoid having to recognize Charging Party Local 40.

(c) Interrogating employees about their union sympathies and whether employees would be willing to cross picket lines.

(d) In any other manner interfering with restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

(e) Refusing to hire or otherwise discriminating against employees to avoid bargaining with a Union.

(f) In any other manner discriminating against employees in regard to the hire or tenure or terms and conditions of employment of its employees.

(g) Refusing to recognize Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, as the exclusive collective bargaining representative of its employees in the following appropriate unit.

> All full-time and regular part-time employees, including employees of lessees, licensees and concessionaires, employed at Respondent's three retail stores at 3430 State Street and 4675 Bay Road, in the City of Saginaw, and 2520 E. Main Street in the City of Corunna, all in the State of Michigan, but excluding meat department employees, guards and supervisors as defined in the Act.

(h) Making changes in the rates of pay and benefits of the employees in the above unit without notice to and consultation with Retail Store Employees Union Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC.

(i) In any other manner refusing to bargain with Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC as the exclusive bargaining representative of its employees within the unit described above.

2. And to take the following affirmative action:

(a) Offer immediate employment to *all* employees who were represented by Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC when The Kroger Company operated Respondent's three retail stores and who have not previously been offered employment by Respondent, to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging, if necessary, employees hired from sources other than the three retail stores when operated by the Kroger Company, to make room for them, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them.

(b) Upon request, bargain with Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC as the exclusive representative of all the employees in the above unit concerning their terms and conditions of employment; and, if an understanding is reached, embody it in a signed contract if asked to do so.

(c) Upon request of Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, cancel any changes from the rates of pay and benefits that existed with respect to the above bargaining unit immediately before its takeover of the three retail stores and make the employees whole by remitting all wages and benefits and other remunerations that would have been paid absent such changes from mid-November, 1981, until it negotiates in good faith with the Union to agreement or to impasse.

(d) Post true copies of the Court's Order Granting the Injunction at places in their premises where employee Notices are customarily posted, until the injunction is dissolved.

3. That upon return of said order to show cause the Court issue an order enjoining and restraining Respondent in the matter set forth above.

4. That the Court grant such further and other relief as may be just and proper.

Dated at Detroit, Michigan this 9th day of July, 1982.

/s/ Bernard Gottfried
Bernard Gottfried, Regional Director
National Labor Relations Board
Seventh Region
Patrick V. McNamara Federal Building
Room 300
477 Michigan Avenue
Detroit, Michigan 48226

(SEAL)

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STATE OF MICHIGAN)
) ss:
COUNTY OF WAYNE)

I, Bernard Gottfried, being first duly sworn, depose and say that I am Regional Director of the Seventh Region of the National Labor Relations Board; that I have read the foregoing petition and exhibits and know the contents thereof; that the statements therein made as upon personal knowledge are true and those made as upon information and belief I believe to be true.

/s/ Bernard Gottfried
Bernard Gottfried
National Labor Relations Board
Seventh Region
Patrick V. McNamara Federal Building
Room 300, 477 Michigan Avenue
Detroit, Michigan 48226

(SEAL)

Subscribed and sworn to before me this 9th day of July, 1982

/s/ Virginia Chamberlin
Virginia Chamberlin
Notary Public

My commission expires: 6/29/85

88-2046
88-5046
88-5046
88 No. 2046

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, CLERK

In the Supreme Court of the United States

KESSEL FOOD MARKETS, INC. AND
KESSEL FOOD STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondent.

BRIEF OF RESPONDENTS, UFCW LOCALS 876 AND 539, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

COUNTER STATEMENT OF QUESTION PRESENTED

Where the National Labor Relations Board, pursuant to statute, authorized a request by its Regional Director for a preliminary injunction based on a probable cause standard, was the respondent (Petitioner here) denied due process because the Board, after an extended due process hearing before an administrative law judge, eventually decided the underlying unfair practice charge on its merits?

The Sixth Circuit held no.

Respondents, UFCW Locals 539 and 876, agree.

LIST OF CORPORATE AFFILIATIONS

Local 876 and Local 539 are both voluntary unincorporated associations. Both are affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC.

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In the Supreme Court of the United States

KESSEL FOOD MARKETS, INC. AND
KESSEL FOOD STORES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondent.

BRIEF OF RESPONDENTS, UFCW LOCALS 876 AND 539, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

On March 16, 1982, the General Counsel of the National Labor Relations Board, by the Regional Director for the Seventh Region of the Board, filed a complaint, alleging that Kessel Food Markets, the Petitioner herein, had violated the National Labor Relations Act. A hearing was scheduled for September 20, 1982. The Charging Parties in the unfair labor practice proceeding, Locals 40 and 539 of the United Food & Commercial Workers International Union (Local 40 has since merged with Local 876), requested that the Board authorize the seeking of interim injunctive relief, in accordance with 29 U.S.C. §160(j), §10(j) of the Act. This request was considered by the Board, which examines §10(j) requests to determine whether there is reasonable cause to believe that the Act has been violated and whether there will be irreparable injury if temporary relief is not sought and granted. *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979). The Board authorized the seeking of an injunction against the Petitioner. The matter was then referred back to the Regional Director of the Seventh Region, Bernard

Gottfried, who on July 9, 1982 filed a complaint in the United States District Court for the Eastern District of Michigan seeking injunctive relief. (Appendix p. A137) The Regional Director declared in his sworn complaint that he had reasonable cause to believe that the Act was violated in the ways set forth in the March 16, 1982 administrative complaint.

The Board withdrew its request for §10(j) injunctive relief on September 10, 1982, after the district judge ordered extensive discovery. The trial commenced on September 20, 1982, and continued in 1982, and in 1983, for approximately 20 hearing days. The General Counsel presented witnesses whom Petitioner Kessel cross-examined. Petitioner Kessel called numerous witnesses in its own behalf. Petitioner Kessel filed an extensive brief to the administrative law judge and later to the National Labor Relations Board, arguing that it had not violated the Act. The administrative law judge, and then later the Board, found that some of the alleged violations had occurred and found that other of the alleged violations had not occurred. The Sixth Circuit Court of Appeals affirmed.

ARGUMENT

Locals 876 and 539, United Food & Commercial Workers International Union, respectfully pray that Kessel Food Markets' petition for a writ of certiorari be denied. There are no special and important reasons for granting it. The courts of appeal are in agreement on the issue presented. There is no important question of federal law. The decision of the Court of Appeals is fully consistent with all applicable decisions of this Court.

A. The Board Did Not Prejudge Kessel.

Kessel misstates a critical fact in its petition to this Court. Kessel says that the National Labor Relations Board (the Board or NLRB) declared in its District Court pleadings that it believed that Kessel had violated the law. In fact, the Board did not make any declaration. The Board did not itself file the district court action. The statements to which Kessel refers were made by the Regional Director of the Seventh Region of the Board.

§10(j) of the National Labor Relations Act, 29 U.S.C. §160(j), requires that the Board authorize the seeking of §10(j) interim relief. The test applied by courts in determining the propriety of §10(j) relief is whether there is reasonable cause to believe that unfair labor practices have been committed and that irreparable injury will ensue in the absence of such relief. *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975); *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979). This is, of course, the standard which the NLRB applies in deciding whether to authorize the seeking of such relief and it is presumably the standard which was applied in the instant case. Having made the decision to seek §10(j) relief, the Board referred the matter back to the Regional Director and it was he who initiated the suit. As can be seen from the first page of the district court pleadings, A137 of the Appendix, it was Bernard Gottfried, Regional Director of the Seventh Region of the NLRB, who was the petitioner. In the pleadings Mr. Gottfried stated that he had reasonable cause to believe that the charges of unfair labor practices were true. There is absolutely no indication that the Board made any determination other than that there was reasonable cause to believe that the Act was violated.[1]

B. Even If The Board Had Made A Preliminary Determination That The Act Was Violated This Would Not Have Deprived Kessel of Due Process.

The Sixth Circuit Court of Appeals relied upon and extensively quoted from this Court's decision in *Withrow v. Larkin*, 421 U.S. 35 (1975), wherein this Court held that a statutory scheme which combined investigatory and adjudicatory functions did not deprive the complainant of due process. Kessel's asserted reliance upon *Withrow* is totally misplaced and rests

[1] Furthermore, there was complete turnover on the five person Board between August, 1982, when the §10(j) petition was authorized, and December, 1987, when the Board's decision issued, so the persons who decided the case had, in fact, never previously considered it. The 47th annual report of the NLRB for fiscal year ending September 30, 1982 lists the Board members as VanDerWater, Fanning, Zimmerman, Jenkins and Hunter. The 52nd annual report of the NLRB for fiscal year ending September 30, 1987 lists the Board members as Dotson, Johansen, Stephens, Babson and Cracraft. (The decision in this case was signed by members Dotson, Johansen and Stephens.)

on a few quotations taken out of context. In *Withrow*, it was observed that it was common for a judge to preside over a matter where he had previously decided whether to grant temporary relief and, further, that "[i]t is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings." *Id.* at 56. These situations would not establish impermissible prejudgment because at the eventual hearing there would be the opportunity to fully litigate the matter.

Withrow relied on *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1947), which fully supports the decision of the Sixth Circuit below. In *Cement Institute* the cement companies argued for the disqualification of the FTC as the adjudicator of complaints against them alleging unfair methods of competition. They cited reports made by the FTC commissioners to Congress and testimony made by some of the commissioners in which they had stated that the method of pricing used in the cement industry was a violation of the Sherman Act. This Court said that it would assume that all of the commissioners had formed the opinion that the companies' conduct violated the law, and then went on to conclude that such opinions would not require the disqualification of the FTC. The Court concluded that the entertainment of views of guilt, resulting from the investigations, would not indicate irrevocably closed minds, and observed that the companies would have the opportunity to fully litigate the charges against them and to convince the FTC that their business practices were valid.[2]

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[2] *Withrow v. Larkin* and *FTC v. Cement Institute* were relied upon by this Court in *Hortonville Dist. v. Hortonville Ed. Assoc.*, 426 U.S. 482, 493 (1976), where the Court said, "Nor is a decision maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' *"United States v. Morgan*, 313 U.S. 409, 421 (1941)." In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court again relied on *Cement Institute* and observed that only in the most extreme cases of bias or prejudice would disqualification be constitutionally required.

In the instant case, Kessel had the opportunity at extended unfair labor practice hearings to present witnesses, to cross-examine witnesses presented by the General Counsel, to submit documentary evidence, and to argue both orally and in extensive briefs that its conduct was not violative of the National Labor Relations Act. The Board did not impermissibly prejudge the matter simply by authorizing the Regional Director to seek interim relief prior to the unfair labor practice trial. The two courts of appeal which have considered this issue have held that the §10(j) procedure did not deprive litigants of due process. *NLRB v. Sanford Home for Adults*, 669 F.2d 35 (2nd Cir. 1981); *Eisenberg v. Holland Rantos Co.*, 234 N.L.R.B. 726, aff'd, 583 F.2d 100, 104 n.8 (3rd Cir. 1978). There is no contrary appellate court authority.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

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No. 88-2046

In the Supreme Court of the United States

OCTOBER TERM, 1988

KESSEL FOOD MARKETS, INC. AND
KESSEL FOOD STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

A. UFCW LOCALS 876 AND 539'S EFFORTS TO REWRITE THE BOARD'S PROCEDURES IN THIS CASE MUST BE REJECTED.

UFCW Locals 876 and 539 (the "Unions") recognize that unless they can divorce the National Labor Relations Board (the "Board") from its 10(j) complaint or water down the Board's declaration of guilt, the Board clearly prejudged Petitioner in violation of due process. The Unions' efforts on both these issues are unsuccessful.

1. Only the Board Is Authorized to Sue for Injunctive Relief Under Section 10(j).

The Board has exclusive authority to sue for injunctive relief under Section 10(j). The Unions' contention that the Board did not itself file the District Court action contradicts the express terms of Section 10(j).[1]

2. The Unions Improperly Identify the Board's Internal Determinations With the District Court Standard for Injunctive Relief.

The Unions ask this Court to infer that, after reviewing General Counsel's ex parte memorandum, the Board decided only that probable cause existed to believe Petitioner violated the Act. The Unions contend that the

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1. *Compare* Section 10(l), 29 U.S.C. § 160(l) which authorizes the Regional Director, on a reasonable cause basis, to file suit for injunctive relief. Section 10(l) provides in relevant part:

> If . . . the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States District Court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

District Court's standard for assessing the propriety of a preliminary injunction is, "of course", the standard the Board applies internally in deciding whether to pursue Section 10(j) relief. The Unions, however, offer no support or authority for that proposition. The only public evidence of the Board's private deliberations concerning a particular 10(j) case is the Board's district court complaint. Here, the Board's unequivocal declaration of Petitioner's guilt in federal court demonstrates that the Board *did not* restrict its findings to a reasonable cause determination.[2]

B. AN ADVERSARY HEARING DOES NOT CURE PREJUDGMENT.

The Unions contend that prejudgment, bias, or unfairness are constitutionally permissible so long as an adversary hearing is held after the fact. That proposition would make a mockery of due process and contradict the principles this Court set out in *Withrow v. Larkin*, 421 U.S. 35 (1975).

In *Withrow*, this Court held that an arbiter's preliminary contact with a contested matter must not preclude a fair adversary hearing on the ultimate merits of the dispute. *Withrow*, 421 U.S. at 58. To satisfy basic requirements of due process, an arbiter must reserve judgment until a full adversary hearing is held. This Court

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2. The Unions cite *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979) for the proposition that the Board merely determines whether reasonable cause exists to believe the Act has been violated. (Union Brief, p.1, 3). It bears noting that the Board's 10(j) petition in *Levine* asserted only a "reasonable cause to believe" that the respondent there had violated the Act. *Levine*, 610 F.2d at 434. Here, on the other hand, the Board declared both a reason to believe *and* its firm conclusion that Petitioner had in fact violated the Act.

recognized, however, that an initial charge or determination of probable cause and ultimate determination have different bases and purposes. *Withrow,* 421 U.S. at 58. As a consequence, in the administrative context:

> . . . there is no incompatibility between the agency filing a complaint based *on probable cause* and a subsequent decision, when all the evidence is in, that there has been no violation of the statute.

Withrow, 421 U.S. at 57. (Emphasis Added).

Withrow did not hold, nor has this Court ever held, that due process merely secures for an accused a chance to change a judge's mind.[3] Here, General Counsel convinced the Board of Petitioner's guilt before Petitioner was asked to present its side of the story. Based on its premature conviction, the Board sued Petitioner in District Court, declaring that Petitioner had violated the Act. To hold that Petitioner's subsequent appeal to the Board satisfies due process would represent a substantial retreat from the principles of fairness that this Court has long championed.

C. THE BOARD'S 10(j) PROCEDURES ARE CONSTITUTIONALLY UNTESTED.

This Court has not considered the constitutionality of the Board's procedures under Section 10(j). The Unions' reliance on *Eisenberg v. Holland Rantos Co.,* 243 N.L.R.B. 726, *aff'd* 583 F.2d 100 (3d Cir. 1978), and *NLRB v. Sanford Home for Adults,* 669 F.2d 35 (2d Cir. 1981),

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3. This Court's opinion in *FTC v. Cement Institute,* 333 U.S. 683 (1947) does not hold otherwise. In that pre-*Withrow* case, this Court held that an administrative agency that reaches and expresses an opinion on a general policy of law is not precluded from applying that policy in a particular controversy.

is misplaced.[4] Neither reported decision reveals whether the Board made an unequivocal declaration of guilt in its District Court pleadings, or merely asserted probable cause to believe a violation had occurred.

D. CONCLUSION.

For these reasons, Petitioner's petition for a writ of certiorari to the Sixth Circuit Court of Appeals should be granted.

Respectfully submitted,

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4. The Court in *Sanford Home* declined to declare Section 10(j) unconstitutional because doing so would "preclude [the Board] from fulfilling its obligation to review and decide whether unfair labor practices have occurred" pursuant to its congressional mandate. *Sanford Home*, 669 F.2d at 37. Congress' intentions, however, are not the measure of due process.